Supreme Court, U.S.
FILED

No. 09-___ 09-499 OCT 23 2009

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IN THE

# Supreme Court of the United States

PEOPLE OF BIKINI, BY AND THROUGH THE KILI/BIKINI/EJIT LOCAL AND GOVERNMENT COUNCIL,
*Petitioners*,

v.

UNITED STATES OF AMERICA.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Between 1946 and 1958, the United States' nuclear testing program irradiated and partially vaporized the Bikini Atoll while the Atoll was under United States trusteeship and its people were U.S. dependents. In 1986, Congress created a Nuclear Claims Tribunal to adjudicate the Bikinians' Fifth Amendment Just Compensation Clause claims against the United States for the taking of their land, and correspondingly withdrew Tucker Act jurisdiction to adjudicate those claims. After the people of Bikini exhausted the Tribunal process, the Tribunal proved incapable of paying even 1% of the compensation owed.

The questions presented are:

1. Whether a statute withdrawing Tucker Act jurisdiction over Just Compensation Clause claims in favor of a newly created administrative process unambiguously expressed congressional intent to bar judicial review of those claims and subsequently arising claims after that administrative process failed to provide just compensation and became non-functional.

2. Whether Congress can legislate or contract itself out of its constitutional obligation to pay citizens and territorial dependents just compensation under the Fifth Amendment.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners, the People of Bikini, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 554 F.3d 996. The opinion of the Court of Federal Claims (App., *infra* 10a-107a) is reported at 77 Fed. Cl. 744.

## JURISDICTION

The court of appeals entered its judgment on January 29, 2009. A petition for rehearing was denied on May 27, 2009. App., *infra*, 109a. On July 28, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 24, 2009, and, on September 14, 2009, the Chief Justice further extended the time for filing to and including October 23, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced at App., *infra*, 111a-132a.

## STATEMENT OF THE CASE

1. Bikini Atoll is part of the Marshall Islands in the central Pacific Ocean. In 1947, the Islands became a Trust Territory administered by the United States. The United States extended to the Bikinians "all rights which are the normal constitutional rights

of citizens under the Constitution." C.A. App. A0974-975.

In 1946, the United States selected Bikini Atoll as a testing site for nuclear weapons and evacuated the Bikinians with promises to return them in a few months and to care for them in the interim. C.A. App. A0970. Between 1946 and 1958, the United States exploded twenty-three atomic and hydrogen bombs on Bikini Atoll, one of which vaporized three islands. App., *infra*, 14a-15a. During that same time, the displaced Bikinians endured "starvation conditions." *Id.* at 17a. The federal government returned the Bikinians to the Atoll in 1969, but evacuated them again nine years later after determining that radiation levels were far too high for human habitation and would remain so for decades to come. *Id.* at 19a. To this date, Bikini Atoll remains uninhabitable. C.A. App. A0973.

In 1981, the Bikinians that originally inhabited Bikini Atoll and their descendants – hundreds of whom are U.S. citizens – filed suit in the Court of Claims, seeking, *inter alia*, compensation under the Fifth Amendment for the taking of their land. The Claims Court held that the Bikinians could seek compensation under the Fifth Amendment and that their claims were timely. *See Juda v. United States*, 6 Cl. Ct. 441, 450-451, 458 (1984).

Two years later, the United States and the local government of the Marshall Islands, which was at that time subject to the United States' complete control and oversight as trust administrator, negotiated a Compact of Free Association that created out of the trusteeship the Republic of the Marshall Islands (RMI). App., *infra*, 112a. The Compact deemed the RMI self-governing in some

respects, but retained for the United States "full authority and responsibility for security and defense matters in or relating to the Marshall Islands." *Id.* at 116a. As part of that decision, Congress created through the "Section 177 Agreement" a Nuclear Claims Tribunal "to render final determination upon all claims past, present and future" of the Marshallese "related to the nuclear testing program." *Id.* at 126a; *see* 48 U.S.C. § 1921b(e)(2). The Agreement also provided $45.75 million (and any income produced from that fund) for the initial payment of compensation awards. App., *infra*, 123a. "[I]n conjunction with the establishment of [that] alternative tribunal to provide just compensation," *People of Enewetak v. United States*, 864 F.2d 134, 136 (1988), *cert. denied*, 491 U.S. 909 (1989), the Section 177 Agreement terminated all federal court litigation arising from the nuclear testing program in favor of claims proceedings before the Tribunal.

2. Following adoption of the Compact, the Court of Federal Claims dismissed the complaint on the ground that exhaustion of the Tribunal's proceedings was required first. *See Juda v. United States*, 13 Cl. Ct. 667 (1987). The court explained that the Agreement's "termination" of claims "applies to termination of proceedings, and not to extinguishment of the basic claims involved," *id.* at 686, noting that Congress had acknowledged its "obligation to compensate" and had simply "establishe[d] an alternative tribunal to provide such compensation," *id.* at 688. "As long as the obligations are recognized," the court explained, "Congress may direct fulfillment without the interposition of either a court or an administrative tribunal." *Id.* at 689. With respect to the Bikinians'

arguments that the Tribunal proceedings would not adequately protect their rights because it was inadequately funded by the United States, the court ruled that "[w]hether the compensation * * * is adequate is dependent upon the amount and type of compensation that ultimately is provided," and thus "[t]his alternative procedure for compensation cannot be challenged judicially until it has run its course." *Ibid.*

In a related appeal, the Federal Circuit agreed that judicial intervention was not appropriate "at this time" based on the "mere speculation that the alternative remedy may prove to be inadequate," and concluded that it need not address the adequacy of the Tribunal process "in advance of [its] exhaustion." *People of Enewetak*, 864 F.2d at 136, 137.

3. The Bikinians accordingly sought just compensation from the Tribunal. App., *infra*, 47a. In March 2001, the Tribunal ruled that the Bikinians were entitled to $563,315,500 in compensation, including $278,000,000 for the past and future loss of their land. *Id.* at 47a-50a. In 2002, the Tribunal paid 0.25% of the award, $1,491,809, explaining that "the Nuclear Claims Fund is insufficient to make more than a token payment." *Id.* at 50a; C.A. App. A0986. In February 2003, the Tribunal made a second payment of $787,370.40. C.A. App. A0987. The Tribunal announced in 2006 that it could neither adjudicate additional claims nor pay further compensation, and that it had only approximately $1 million remaining. App., *infra*, 4a; http://www.nuclearclaimstribunal.com/piawards.htm

4. In 2006, the Bikinians filed this action in the Court of Federal Claims seeking, as relevant here, compensation both for the taking of their land and

for the taking of their constitutional claims – their chose in action – in the Tribunal. The court dismissed the complaint, App., *infra*, 86a-92a, ruling that Congress had statutorily barred federal court jurisdiction over the taking of the Bikinians' claim before the Tribunal. The court further ruled that both claims were premature because Congress might eventually choose to provide funds, *id.* at 59a-60a, and that the claims for just compensation constituted political questions, *id.* at 92a-108a.

5. The court of appeals affirmed. App., *infra*, 1a-9a. The court held that Congress validly foreclosed all federal court jurisdiction over the Bikinians' just compensation claims regardless of the Tribunal's inability to provide just compensation. App., *infra*, 7a-8a. The court acknowledged that this Court, in *Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102 (1974), expressed "grave doubts" about whether congressional withdrawal of a Tucker Act remedy for a taking that was not compensated administratively "would be constitutional," but reasoned that it "d[id] not need to follow the careful course" outlined by Supreme Court precedent for finding a permanent withdrawal of Tucker Act jurisdiction because the withdrawal "does not present any statutory ambiguities." App., *infra*, 8a. The court concluded that, while "it [is] difficult to turn away from a case of constitutional dimension," the Bikinians' constitutional "wrong * * * is not within its power to adjudicate." *Id.* at 9a.

## REASONS FOR GRANTING THE PETITION

The Federal Circuit held that Congress can withdraw Tucker Act jurisdiction over Just Compensation Clause claims brought by United

States citizens and dependents and replace it with nothing – completely foreclosing the enforcement by any court of a self-executing constitutional right. The court of appeals reached that unprecedented holding by forsaking the framework for analysis of Tucker Act jurisdictional limitations prescribed again and again by this Court. More specifically, the court conflated the inquiry into whether Congress withdrew jurisdiction to adjudicate the claim in the first instance with whether Congress clearly and unambiguously forbade judicial recourse for the constitutional shortfall in compensation that arose after the Tribunal process collapsed and proved incapable of providing just compensation. Only explicit and unequivocal evidence should permit a court to attribute to Congress the deliberate intent to consign its citizens and dependents to a non-functioning administrative forum for vindication of their constitutional rights.

The Federal Circuit's decision that Congress can, in that manner, legislate itself out of its constitutional obligations under the Fifth Amendment's Just Compensation Clause also contravenes decisions from this Court and other courts of appeals repeatedly recognizing that the Clause is self-executing. The Fifth Amendment would be an empty protection indeed if Congress could avoid its command simply by passing a law declaring that it will pay whatever it chooses to pay and forbidding *all* courts to afford relief. Nor can Congress escape that constraint by framing its action as a "settlement," because that simply begs the foundational question of whether Congress has the constitutional power to settle unilaterally individual claims by United States citizens against the United

States government without the consent of those individuals. The Constitution forbids the Political Branches to help themselves right out of the Bill of Rights' commands.

## I. The Federal Circuit's Decision Conflicts With This Court's And Other Circuits' Precedent Governing The Permanent Preclusion Of Jurisdiction Over Just Compensation Claims.

The Federal Circuit's decision cannot be reconciled with this Court's precedent repeatedly admonishing courts that only the most explicit and unequivocal congressional command could permanently and conclusively foreclose *any* judicial forum for a Just Compensation Clause claim, even after the administrative forum chosen by Congress has become non-functional.

1. Because of the serious constitutional concerns raised by a permanent withdrawal of jurisdiction for Just Compensation Clause claims, this Court has repeatedly held that only "an unambiguous intention to withdraw the Tucker Act remedy" will suffice, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984), and that congressional intent to do so must be "clear and unmistakable," *Preseault v. ICC*, 494 U.S. 1, 14 (1990).

In determining whether that high threshold has been met, this Court has instructed courts to analyze the withdrawal of jurisdiction in two steps. First, a court must consider whether there has been a statutory withdrawal of the Tucker Act as the ordinary, default remedy for an alleged taking. *Monsanto*, 467 U.S. at 1016. The court of appeals was correct that the statutory language in Section

177 on which it relied, App., *infra*, 131a, channeled into the Tribunal the Bikinians' claim that their land was taken without just compensation and withdrew Tucker Act jurisdiction to adjudicate that claim in the first instance.

But the court of appeals failed to address the critical – and analytically distinct – second inquiry, which is whether the language initially withdrawing jurisdiction also permanently foreclosed Tucker Act jurisdiction over any constitutional claims arising from deficiencies in that alternative process itself. Those are very different claims. And even when the Tucker Act has been expressly displaced as the initial forum for obtaining compensation, this Court has routinely held that Tucker Act jurisdiction remains available for the limited purpose of redressing any constitutional shortfall arising after the alternative remedial mechanism has been exhausted and has come up short.

What this Court has repeatedly held – and what the court of appeals here fundamentally disregarded – is that the same statutory language that is sufficient to withdraw the initial Tucker Act remedy is *not* alone sufficient to withdraw Tucker Act jurisdiction over a claim that the alternative forum itself failed to provide constitutionally adequate compensation. Such language "does not withdraw the possibility of a Tucker Act remedy, but merely requires that a claimant first seek satisfaction through the [alternative] statutory procedure." *Monsanto*, 467 U.S. at 1018.

Instead, a much more exacting statutory test for a permanent withdrawal of jurisdiction is necessary because a total prohibition on federal jurisdiction to review even a constitutional shortfall claim raises

"clearly grave" constitutional questions concerning Congress's ability to legislate itself out of the Fifth Amendment's Just Compensation Clause, *Blanchette*, 419 U.S. at 134, that the initial substitution of an alternative forum does not, *see Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

In *Blanchette*, for example, the Court considered whether Tucker Act jurisdiction was available for Just Compensation Clause claims arising from the Rail Act, which established a specialized scheme for judicial review of railroad claims, expressly directed that "[t]here shall be no review of the decision of the special court," and imposed a specific cap on payments by the United States. 419 U.S. at 109-110, 119 & nn.5 & 6. This Court held that the "Tucker Act remedy is not barred" and remains "available to provide just compensation" for any "constitutional shortfall" in remediation, *id.* at 136, 148. *See also, e.g., Kirby Forest Industries v. United States*, 467 U.S. 16, 18 (1984) (where a specially designated commission's award fell short of the Constitution's measure of just compensation, that shortfall gave rise to a Just Compensation Clause claim in federal court); *Monsanto*, 467 U.S. at 1018 (Tucker Act jurisdiction remains to remedy "shortfall" in compensation from administrative scheme).

Thus, once exhaustion of the administrative remedy has taken place, as it has here, and once the constitutional insufficiency of that process is exposed, as it has been here, then only the clearest and most unequivocal evidence of a deliberate congressional determination "to *prevent* such [constitutional] recourse" will suffice. *Blanchette*, 419 U.S. at 126 (emphasis added). This Court has

consistently viewed seemingly categorical statutory language as preserving jurisdiction over such second-stage review. Even under statutes providing that "there shall be no review," *Blanchette*, 419 U.S. at 110, or "[n]otwithstanding any other provision of law, no court shall have jurisdiction," *INS v. St. Cyr*, 533 U.S. 290, 299-300 (2001), or individuals "shall forfeit the right to compensation," and "no official or court of the United States shall have power or jurisdiction to review" the administrative proceedings, *Monsanto*, 467 U.S. at 994 n.4, 1018, Tucker Act jurisdiction has always remained to remedy any constitutional shortfalls in compensation. *See also Dames & Moore v. Regan*, 453 U.S. 654, 666, 689 (1981) (Presidential order that claims "shall have no legal effect in any action now pending in any court" does not foreclose Tucker Act remedy for deficiency in tribunal's compensation).

That is precisely the relief the Bikinians seek. They seek not to avoid the Tribunal process – they dutifully exhausted it. They simply seek an adjudication of their claims that the Tribunal's payment of less than one-half of one percent of the compensation owed is not just compensation within the meaning of the Fifth Amendment. That is not a question on which Congress's chosen administrative forum can have the last word or even the job with which the Tribunal was tasked. "Just compensation is provided for by the Constitution and * * * [its] ascertainment is a judicial function." *Seaboard Air Line Railway Co. v. United States*, 261 U.S. 299, 304 (1923).

2. The court of appeals' conclusion that the same statutory text that channeled claims into the

Tribunal in the first instance also withdrew jurisdiction over the constitutional shortfall claim, App., *infra*, 8a, thus asked the wrong question. The question before the court under *Blanchette* was no longer whether the Tucker Act remedy had been displaced, but whether Congress affirmatively intended to "prevent" constitutionally mandated recourse if the Tribunal process itself failed. 419 U.S. at 126. Under this Court's precedent, the answer to that question is no.

First, the statutory text does not express any "clear and unmistakable congressional intent" to withdraw Tucker Act jurisdiction over constitutional claims arising out of the Tribunal process itself. *Preseault*, 494 U.S. at 14. The withdrawal of jurisdiction in Article XII of the Compact Act is limited to claims "based upon, arising out of, or in any way related to the nuclear testing program." The provision says nothing about constitutional claims that independently arise through the operation – or collapse – of the Tribunal process.

The withdrawal of jurisdiction moreover is expressly limited to "claims described in Article X and XI." App., *infra*, 130a. But "disputes arising from distributions" of adjudicated awards or the failure of the Tribunal to make the required distribution are governed by a different Article (Article IV). *Id.* at 125a-128a.

Furthermore, the Agreement's withdrawal of jurisdiction speaks only to "claims" that were "terminated" by the Agreement's creation of the Tribunal. App., *infra*, 130a. As a matter of ordinary usage, only existing claims can be "terminated." Thus, the plain text of the Compact Act indicates that Article XII is intended to ensure that all

existing claims pending in court at the time of the Agreement were "terminated" and channeled to the Tribunal as an initial matter. That language does not naturally describe claims arising from the deficiency of the Tribunal process itself.

Second, even if the language of the withdrawal provision could be stretched to cover constitutional claims arising from deficiencies in the Tribunal process itself, that interpretation "would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,'" this Court's precedent mandates that the alternative construction be adopted. *St. Cyr*, 533 U.S. at 299-300; *see Blanchette*, 419 U.S. at 134 (refusing to construe statute to permanently repeal Tucker Act because of "grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available" to remedy constitutional shortfalls).

Similarly, the "cardinal rule * * * that repeals by implication are disfavored," *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (citations omitted), and courts' corresponding duty to "regard each [statute] as effective" where they "are capable of co-existence," *J.E.M. Ag Supply v. Pioneer Hi-Bred Int'l*, 534 U.S. 124, 143-144 (2001) (citations omitted), required the court of appeals to hold that Tucker Act jurisdiction was available for constitutional claims arising out of the Tribunal process itself. That is, in fact, how the D.C. Circuit in *Antolok v. United States*, 873 F.2d 369, 378 (D.C. Cir. 1989), the Federal Circuit in *Enewetak*, 864 F.2d at 136, and the trial court in *Juda*, 13 Cl. Ct. at 689, all read the exact same language, belying any suggestion that Congress expressed "clear and

unmistakable intent" to permanently withdraw Tucker Act jurisdiction.

Third, under this Court's precedent and that of the Third and Eighth Circuits, only specific discussion of the Tucker Act's availability and affirmative evidence that Congress fully intended "to prevent such [constitutional] recourse" will completely foreclose Tucker Act relief. *Blanchette*, 419 U.S. at 126; *see also, e.g.*, *Glosemeyer v. Missouri-Kansas-Texas R.R.*, 879 F.2d 316, 325 (8th Cir. 1989) (no withdrawal of jurisdiction where statutory text does not mention Tucker Act); *Neely v. United States*, 546 F.2d 1059, 1064 (3d Cir. 1976) (action under Tucker Act not repealed when Congress did not expressly address the issue).

Unlike the rule in the Third and Eighth Circuits, however, the Federal Circuit's decision disregarded that neither the Compact nor Section 177 "mentions the Tucker Act," *Preseault*, 494 U.S. at 12, discusses "the interaction between [those statutes] and the Tucker Act," *Monsanto*, 467 U.S. at 1017, or otherwise "deal[s] with the [Tucker Act] remedy," *Blanchette*, 419 U.S. at 136. Indeed, here, as in *Blanchette*, Congress's discussion of the interaction of the Compact Act with other laws, *see* 48 U.S.C. § 1905(h)(4) (Federal Tort Claims Act); *id.* § 1904(f)(3) (Magnuson Fishery Conservation and Management Act and Fishermen's Protective Act applicable to Marshall Islands); *id.* § 1905(f) (Foreign Agents Registration Act); *id.* § 1905(l) (National Historic Preservation Act), makes its silence with respect to the Tucker Act all the more telling and "plainly implies that Congress gave no thought to consideration of withdrawal of the Tucker Act

remedy" if the Tribunal process failed, *Blanchette*, 419 U.S. at 129.

Fourth, also like *Blanchette*, *Monsanto*, and *Preseault*, nothing in the legislative history of Section 177 evidences Congress's intent affirmatively to prevent a Tucker Act claim as a constitutional backstop to the Tribunal process. To the contrary, what little consideration the question received supports continued Tucker Act jurisdiction. *See* 131 Cong. Rec. H11787, 11838 (Dec. 11, 1985) (Rep. Seiberling) ("But a legacy of the unique relationship of the United States to the Marshall Islanders * * * will be the pending constitutional questions with respect to their rights, questions which cannot be foreclosed from court review.").

Importantly, the Compact Act and the Agreement were enacted after this Court's decisions in *Blanchette* and *Monsanto* established the high level of specificity needed to withdraw Tucker Act jurisdiction completely. Thus, the absence of textual or historical support for foreclosing all constitutional review further underscores that Congress did not intend the constitutionally suspect result imposed by the Federal Circuit here. *See Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993) (presuming congressional awareness of relevant Supreme Court decisions when drafting laws).

Fifth, with respect to the government's provision of a lump sum of money under the Compact and Section 177, the Federal Circuit got the analysis exactly backwards. Rather than support the termination of Tucker Act jurisdiction, as the court of appeals reasoned, App., *infra*, 7a-8a, such appropriations support continued Tucker Act review because Congress presumably was "so convinced that

the huge sums provided would surely equal or exceed the required constitutional minimum that it never focused upon the possible need for a suit in the Court of Claims," *Blanchette*, 419 U.S. at 128; *see Preseault*, 494 U.S. at 15.

Finally, the Federal Circuit's severe truncation of this Court's rigorous standard for a permanent withdrawal of jurisdiction will have widespread and substantial implications beyond this case, given the Court of Federal Claims' specialized role in adjudicating Tucker Act claims and the Federal Circuit's corresponding role in reviewing those decisions. *See* 28 U.S.C. § 1295(a)(3) (Federal Circuit exclusive jurisdiction over appeals from Court of Federal Claims); 28 U.S.C. § 1491(a)(1) (Court of Federal Claims has exclusive jurisdiction under the Tucker Act over all Just Compensation Clause claims exceeding $10,000). Thus, this Court's review is necessary to bring the Federal Circuit's Tucker Act jurisprudence in line with this Court's precedent and the law of other circuits.

## II. The Federal Circuit's Decision Conflicts With Decisions Of This Court And Other Circuits Holding That The Just Compensation Clause Is Self-Executing.

Putting aside that the Compact Act does not evidence the requisite "clear and unmistakable intent" to prevent Tucker Act jurisdiction over claims arising from the Tribunal's functional collapse, the court of appeals' constitutional holding equally warrants review. At bottom, the court held that Congress could legislate itself out of the Just Compensation Clause. *See, e.g.*, App., *infra*, 8a (Section 177 placed claims "outside the reach of

judicial remedy"). The practical and legal consequences of that holding are substantial and extend far beyond this case, particularly given the Federal Circuit's unique role in reviewing claims for just compensation. Compounding the need for this Court's review are the conflicts that decision creates with this Court's precedent and the rulings of its sister Circuits, all of which have faithfully enforced the Fifth Amendment's Just Compensation clause as self-executing.

### A. The Federal Circuit's Ruling Contravenes This Court's Precedent.

This Court has repeatedly held that the Fifth Amendment's assurance of just compensation is uniquely "self-executing." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987); *see also, e.g.*, *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 654 (1981) (Just Compensation Clause has a "self-executing character"); *United States v. Clarke*, 445 U.S. 253, 257 (1980) (same). Because "the compensation remedy is required by the Constitution," *First English*, 482 U.S. at 317, Congress's "[s]tatutory recognition" "[is] not necessary," *Jacobs v. United States*, 290 U.S. 13, 16 (1933), nor is a congressional "promise to pay," *Seaboard*, 261 U.S. at 304.

The Federal Circuit's ruling that Congress could legislate itself out of its obligation to provide just compensation to U.S. citizens and dependents simply by forcing their claims into an administrative forum and then refusing to fund that forum's awards cannot be reconciled with that precedent. Indeed, the Federal Circuit quite straightforwardly held that the government escaped liability because it broke its

"promise to pay," *Seaboard*, 261 U.S. at 304. *Compare* App., *infra*, 114a (Section 177 of Compact Act promised to provide "just and adequate" compensation"); *id.* at 124a (promising that "[a]ll monetary awards made by the Claims Tribunal pursuant to Article IV of this Agreement" would be "paid in full"); *id.* at 118a (promising to "provide, in perpetuity, a means to address past, present and future consequences of the Nuclear Testing Program"), *with* App., *infra*, 4a (less than 0.5% of the total award paid). The contrast between the positions the government took in 1988 and in 2008 underscores the point. *Compare* U.S. C.A. Br., *People of Bikini v. United States*, Nos. 88-1206 et al. (Fed. Cir.) (June 1988), at 33 ("Appellant's constitutional challenge proceeds from the presumption that an international Compact, to which two governments have committed themselves and their resources, will not provide the just remedy it promises. That presumption is wholly incorrect."); *id.* at 35 (noting the government's "continuing moral and humanitarian obligation on the part of the United States to compensate any victims—past, present or future—of the nuclear testing program"); *id.* at 34, 38 (same brief, stating that Section 177 Agreement provides "continuous funding" and a "comprehensive, long-term compensation plan"), *with* U.S. C.A. Br., *People of Bikini v. United States*, No. 2007-5175 (Fed. Cir.) (Apr. 4, 2008) at 25 (no constitutional issue posed, because Section 177 Agreement offers "monetary compensation" greater than "zero").

Because the Bikinians' suit "rest[s] upon the Fifth Amendment" itself, *Jacobs*, 290 U.S. at 16, "the right to it cannot be taken away by statute,"

*Seaboard*, 261 U.S. at 304. *See First English*, 482 U.S. at 316 ("[This] Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution."); *Baltimore & Ohio R.R. Co. v. United States*, 298 U.S. 349, 364-365 (1936) (foreclosing altogether "an investigation by judicial machinery * * * [is] in violation of the Constitution of the United States"). Thus, contrary to the court of appeals' assumption, the Just Compensation Clause is not subject to the type of complete congressional negation approved by the Federal Circuit here. That is why, long before the Tucker Act's passage, this Court recognized the private enforceability of the Just Compensation Clause. In *United States v. Lee*, 106 U.S. 196 (1882), for example, this Court held that courts must "give remedy to the citizen whose property has been * * * devoted to public use without just compensation," since "[i]n such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name," *id.* at 218-219. *See also id.* at 220 (Fifth Amendment rights "were intended to be enforced by the judiciary").

Similarly, in *United States v. Great Falls Manufacturing Company*, 112 U.S. 645 (1884), this Court held that, when the United States has "taken the property of the claimant for public use," it is "under an obligation, imposed by the Constitution, to make compensation," and "[t]he law will imply a promise to make the required compensation" when such a taking occurs, *id.* at 656. *See also, e.g.*, *Kohl v. United States*, 91 U.S. 367, 376 (1875); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 312 (C.C.D.

Pa. 1795) ("[T]he legislature * * * cannot constitutionally determine upon the amount of the compensation, or value of the land.").

Finally, the Federal Circuit attempted to qualify its holding by characterizing Congress's action as a "settlement." App., *infra*, 8a-9a. But there is no dispute that the government never reached a settlement with the individual claimants who are petitioners here. The whole settlement rationale propounded by the court of appeals thus begs the question presented: whether Congress has the constitutional power to release itself, without any judicial review, from claims by U.S. citizens against the U.S. government simply by adopting laws, whether statutes or compacts with local governments under the United States' dominion and control.

For similar reasons, the Federal Circuit's invocation (App., *infra*, 9a) of *United States v. Pink*, 315 U.S. 203 (1942), and the political question doctrine is misguided. *Pink* dealt with the President's resolution of claims against a foreign government. It says nothing about Congress's ability to legislate or contract the *United States government* out of *constitutional* claims by *U.S. Citizens and dependents* against the *United States government*. *See Medellin v. Texas*, 128 S. Ct. 1346, 1351-1352 (2008) (*Pink* "involve[d] a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals."); *Dames & Moore*, 453 U.S. at 691 (Powell, J., concurring & dissenting in part) ("The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject

to the jurisdiction of our courts."); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

### B. The Federal Circuit's Decision Conflicts With The Rulings Of Other Circuits.

Until now, every court of appeals to address the question – nine in total – has held that the Just Compensation Clause is "self-executing" and thus cannot be defeated by congressional design. For example, in sharp contrast to the Federal Circuit's decision here, the Second Circuit has made clear that "the exercise of Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment," and thus that, "while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to * * * take private property without just compensation." *Battaglia v. General Motors*, 169 F.2d 254, 257 (2d Cir. 1948).

Likewise, the Seventh Circuit has ruled that "[t]he just compensation requirement of the Takings Clause places takings in a class by themselves because, unlike other constitutional deprivations, the Takings Clause provides both the cause of action and the remedy." *Wisconsin Central Ltd. v. Public Serv. Comm'n of Wisc.*, 95 F.3d 1359, 1368 (7th Cir. 1996). *See also McKesson v. Islamic Republic of Iran*, 539 F.3d 485, 490 (D.C. Cir. 2008) ("cause of action" may be "infer[red]" from Just Compensation Clause); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 953-954 (9th Cir. 2008) (Just Compensation Clause is "self-executing"); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 n.7 (6th Cir. 2004) (States have no power to deny a just compensation remedy because Just

Compensation Clause is "self-executing"); *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1278 (11th Cir. 1998) (States must provide "means of redress" for deprivations of property because Just Compensation Clause is "self-executing"); *Mann v. Haigh*, 120 F.3d 34, 37 (4th Cir. 1997) (distinguishing suit brought under Just Compensation Clause, a "situation in which the Constitution itself authorizes suit against the federal government," from other suits against United States where jurisdiction exists "only if Congress has consented to suit") (citations omitted); *Oglala Sioux Tribe v. United States*, 650 F.2d 140, 143 (8th Cir. 1981) (Constitution "allow[s] suit for just compensation directly under the Fifth Amendment"); *Duarte v. United States*, 532 F.2d 850, 852 n.3 (2d Cir. 1976) (Due Process Clause not "self-executing," unlike the Just Compensation Clause); *Board of Comm'rs v. United States*, 100 F.2d 929, 934 (10th Cir. 1939) ("just compensation being provided for by the Constitution, such right cannot be taken away by statute, the ascertainment being a judicial function," and hence landowners have action against State for unlawful appropriation of funds).

The Federal Circuit's holding that Congress can take itself out of the Just Compensation Clause conflicts with those other Circuits' faithful enforcement of that Clause's self-executing character. Given the Federal Circuit's special role in adjudicating Just Compensation Clause claims, this Court's intervention is critical to bring uniformity to the law and to ensure that the vindication of constitutional rights does not vary based on jurisdictional geography.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 23, 2009

## APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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**United States Court of Appeals,**
**Federal Circuit.**

2007-5175

The PEOPLE OF BIKINI, by and through the KILI/BIKINI/EJIT LOCAL AND GOVERNMENT COUNCIL,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

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2007-5176

Ismael John, Jackson Ading, James Gideon, Kunio Joseph, Harry Jackson, Boaz David, Sam Levai, Baliken Jackson, David Obet, Kosima Johannes, Jinet Langrus, Ebel Joseph, George Yoshitaro, Isaho Luther, Bikenji Paul, Neptali Peter, and Moses Abraham, for Themselves and for a Class Consisting of the People of Enewetak,

Plaintiffs-Appellants,

v.

United States,

Defendant-Appellee.

Appeals from the United States Court of Federal Claims

in 06-CV-288 and 289, Judge Christine O.C. Miller.

DECIDED: Jan. 29, 2009.

Before LOURIE, RADER, PROST, *Circuit Judges.*

RADER, *Circuit Judge.*

The people and descendants of the Bikini and Enewetak Atolls seek just compensation for the taking of their land and their legal claim by the United States government. The Nuclear Claims Tribunal has awarded, but not completely funded, compensation for the Atolls' inhabitants due to bomb testing in the 1940s and 1950s. Because the parties clearly and unambiguously agreed to extinguish any judicial jurisdiction over the claims presented in these appeals, this court affirms the United States Court of Federal Claims' dismissal of these complaints.

I.

The Court of Federal Claims sets forth the background of this dispute in great detail. *See People of Bikini v. United States,* 77 Fed. Cl. 744 (2007); *John v. United States,* 77 Fed. Cl. 788 (2007). Accordingly, this opinion will only discuss those facts necessary for these appeals. The Bikini and Enewetak Atolls are two of twenty-nine atolls and five islands comprising the Marshall Islands. In December 1947, the United States selected these Pacific Ocean atolls as sites for the Nuclear Testing Program. The United States removed the inhabitants of these islands from their homes. Many refugees suffered deprivations in their new conditions. Meantime the weapons testing programs devastated the islands and lagoon, scattering massive amounts of

radioactive material.

The Plaintiffs-Appellants represent the people and descendants of the Bikini and Enewetak Atolls. In the early 1980s, both groups filed claims in the United States Court of Claims. The Plaintiffs sought just compensation for the Fifth Amendment taking of their land and damages for the United States' breach of its fiduciary duties. During this litigation, the governments of the United States and the Marshall Islands reached a settlement agreement to compensate the refugees and victims. The United States presented this Compact of Free Association to Congress in 1984. The Compact of Free Association Act of 1985 (the Compact Act) became law on January 14, 1986. Pub. L. No. 99-239, 99 Stat. 1770 (1986). Section 177(a) of the Compact Act sets forth the United States' acceptance of responsibility for the damage to property and persons resulting from the Nuclear Testing Program. Section 177(b) provides for the settlement of all claims past, present and future that are based upon, arise out of, or are in any way related to the Nuclear Testing Program. The United States and the Government of the Marshall Islands entered into a further agreement to implement Section 177 of the Compact Act-the Section 177 Agreement-on October 21, 1986. The Compact Act specifically references and incorporates the provisions of the Section 177 Agreement into the Compact Act. Compact Act, § 103(g). In view of the Compact Act and the Section 177 Agreement, the successor to the Court of Claims, the United States Claims Court, held that the United States' consent to be sued under the Tucker Act had been withdrawn with respect to the pending takings claims and dismissed. *Juda v. United States,* 13 Cl. Ct. 667 (1987).

The Section 177 Agreement created a Nuclear Claims Tribunal to render final determination upon all

"past, present and future" claims related to the Nuclear Testing Program. Congress committed $150 million to initiate a trust fund to support the Tribunal's operations and awards. Section 177 Agreement, Art. I, § 1. Congress designated $45.75 million of that amount for the payment of awards. *Id.* at Art. II, § 6(c). Even from its inception, many critics recognized that the Tribunal fund would not satisfy all of the claims.

On August 3, 2000, the Tribunal awarded the Plaintiffs-Appellants, the People of Enewetak, $385,894,500, including $244,000,000 for past and future loss of Enewetak Atoll, $107,810,000 for restoration costs and radiation cleanup, and $34,084,500 for hardships suffered during the relocation from the atoll. In February 2002 and 2003, the Tribunal paid only $1,078,750 and $568,733 on those awards-less than 1% of their total award.

In March 2001, the Tribunal awarded the Plaintiffs-Appellants, the People of Bikini, $563,315,500 in compensation, including $278,000,000 for the past and future loss of their land. Due to inadequate funding, however, the Tribunal paid only $1,491,809 in 2002, recognizing that the fund is "insufficient to make more than a token payment." The fund made a second payment of $787,370.40 in 2003, approximately 0.4% of the total award. As of October 2006 only $1 million remained in the Tribunal fund.

Article IX of the Section 177 Agreement provides an avenue for seeking additional funding from Congress. A "Changed Circumstances" petition can be submitted to Congress if "such injuries render the provisions of this Agreement manifestly inadequate." Section 177 Agreement, Art. IX. Article IX goes on to say that it "does not commit the Congress of the United States to authorize and appropriate funds." *Id.* The Government of the Marshall Islands submitted a Changed

Circumstances petition to Congress requesting additional funding in 2000. To date, Congress has not acted on that petition.

In 2006, the Plaintiffs-Appellants brought suit in the United States Court of Federal Claims seeking just compensation for deprivation of property rights under the Fifth Amendment. The Plaintiffs based their takings claims on inadequate funding of the Tribunal's award programs (claims-based taking) and the deprivation of their land during the testing (land-based taking). Before the United States Court of Federal Claims, the Appellants also asserted various contract and implied contract theories.

The Court of Federal Claims granted the Government's motion to dismiss primarily because the Section 177 Agreement deprives any court of the United States of jurisdiction over these claims. The trial court also observed that nonjusticiable political questions, ripeness doctrines, statute of limitations bars, collateral estoppel bars, and other deficiencies in the claim prevented any grant of relief. The Appellants timely appealed to this court. On appeal, this court received only the land-based and claims-based taking claims.

II.

This court reviews the dismissal of a complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims without deference. *See Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004); *Shearin v. United States*, 992 F.2d 1195, 1195 (Fed. Cir. 1993).

The Section 177 Agreement states: "This Agreement constitutes the *full settlement* of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program...." Section 177 Agreement, Art. X (emphasis

added). This enacted Agreement has the force of law. Compact Act, § 175.

Addressing the "United States Courts," Article XII of the settlement agreement instructs, "All claims described in Articles X and XI of this Agreement shall be terminated. *No court of the United States shall have jurisdiction* to entertain such claims, and any such claims pending in the courts of the United States *shall be dismissed.*" Section 177 Agreement, Art. XII (emphasis added). Article XII thus represents the parties' agreement to extinguish any judicial power to hear these claims.

This court proceeds from the vantage point that constitutional rights and "wrongs," if at all possible, deserve a forum for hearing and relief in the U.S. judicial system. At the same time, this court acknowledges that its first obligation is to ensure that it has power and authority to hear a claim, even a constitutional claim, in the first place. *See Ex parte McCardle*, 74 U.S. 506, 512 (1868) ("The first question necessarily is that of jurisdiction.").

To be specific, the United States Constitution divides power between the legislative, executive, and judicial branches. Judicial power is vested in one Supreme Court and "in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. 3, § 1. By "ordain," the Constitution meant to give the legislature the power to set the jurisdiction and the limits of judicial authority for the "inferior Courts." In addition, the legislative authority to establish the inferior courts includes the power to limit their jurisdiction and powers. Because Congress "ordain[s] and establish[es]" all courts under the Supreme Court, the legislative authority includes the power to set their jurisdiction. And just as Congress can grant jurisdiction, Congress can take it away. *See Ex*

*parte McCardle*, 74 U.S. at 514 ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). Thus, before proceeding to hear any claim, even a constitutional claim, this court must ensure that it has jurisdiction to act.

The Section 177 Agreement is a settlement agreement. By its own terms, it constitutes "the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program." Section 177 Agreement, Art. X, § 1. As part of the agreement, the Government of the United States committed $150 million to the fund, setting aside $45.75 million for the payment of monetary awards rendered by the newly created Nuclear Claims Tribunal.

On appeal, the parties do not contest the amount awarded by the Nuclear Claims Tribunal. Rather they seek enforcement of the award-in spite of the Claims Tribunal's award of amounts beyond the funding limits of the settlement agreement. Moreover the parties contemplated the prospect of inadequate funding for full compensation when entering into the Section 177 Agreement. In the event that "such injuries render the provisions of this Agreement manifestly inadequate," Article IX provides an avenue for submitting a changed circumstances petition to Congress.

The "Changed Circumstances" provision acknowledges that "this Article does not commit the Congress of the United States to authorize and appropriate funds." Section 177 Agreement, Art. IX. The parties expressly agreed to this procedure and in doing so trusted the U.S. Congress to weigh and evaluate and

act upon any changed circumstances. Thus, the settlement agreement entrusted the funding remedy to a procedure outside the reach of judicial remedy.

Indeed on that point, the language of the settlement agreement is clear: "All claims described in Articles X and XI of this Agreement shall be terminated. *No court of the United States shall have jurisdiction* to entertain such claims, and any such claims pending in the courts of the United States *shall be dismissed.*" Section 177 Agreement, Art. XII (emphasis added). This statement represents not only the United States' removal of its consent to be sued in the courts over these claims but also the claimants' waiver of their right to sue over these claims in any U.S. court. Thus, this court has no authority in this matter, except to dismiss for lack of jurisdiction.

This case does not present any statutory ambiguities about the jurisdiction or, actually, the absence of jurisdiction to entertain the Bikini and Enewetak taking claims. This court notes that, in *Blanchette,* the Supreme Court refused to resolve ambiguities in the statute about Tucker Act jurisdiction to avoid encountering "grave doubts" about the constitutionality of the Rail Act itself. *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 134 (1974). This court does not need to engage in any caution due to ambiguities. The language of the Section 177 Agreement presents no ambiguities whatsoever. Therefore, this court does not need to follow the careful course of the *Blanchette* case.

Moreover, unlike the *Blanchette* case, this case involves a settlement negotiated between the United States and the Government of the Marshall Islands. The power to conduct foreign relations includes the power to recognize a foreign sovereign and the authority to enter into an international claims settlement on behalf of

nationals. *See United States v. Pink*, 315 U.S. 203, 229-30 (1942). The Plaintiffs-Appellants, the People of Enewetak, challenge the validity of that espousal. However, that challenge raises a political question beyond the power of this or any court to consider. *Id.* at 229, 62 S. Ct. 552 ("What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." (quoting *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938))).

This court observes that its sense of justice, of course, makes it difficult to turn away from a case of constitutional dimension. However, the same sense of justice recognizes that this court cannot act without jurisdiction. In sum, this court cannot hear, let alone remedy, a wrong that is not within its power to adjudicate. The sweeping language of the Section 177 Agreement withdraws jurisdiction of the U.S. courts. Thus, this court affirms the United States Court of Federal Claims' dismissal of these complaints.

*AFFIRMED*

In the United States Court of Federal Claims

No. 06-288C

(Filed August 2, 2007)

The PEOPLE OF BIKINI, by and through the KILI/BIKINI/EJIT LOCAL GOVERNMENT COUNCIL, Plaintiffs,

v.

The UNITED STATES, Defendant.

## *OPINION AND ORDER*

MILLER, Judge.

This case,[1] a resurrection of proceedings before the court in the late 1980s, is before the court after argument on defendant's dispositive motion. Following the filing of plaintiffs' amended complaint on July 17, 2006, defendant moved to dismiss pursuant to RCFC 12(b)(1) and 12(b)(6). The instant case, along with its companion, *Ismael John et al. v. United States,* No. 06-289L (Fed. Cl. filed Apr. 12, 2006),[2] puts before the court the nature of the legal responsibility undertaken by the United States for the post-World War II testing of thermonuclear bombs on the island homelands of plaintiffs. This program obliterated or compromised the land and caused the relocation of the islands'

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[1] This court accepted voluntary transfer of the case, including the fully briefed dispositive motion, by order entered on February 27, 2007.

[2] The opinion in the companion case also is issued this date.

inhabitants, who have sought redress in political, judicial, and special-purpose fora over the last sixty years. Argument has been held, and two rounds of supplemental briefing have been completed.[3]

## BACKGROUND

Plaintiffs include twenty-four persons with land rights on Bikini Atoll. All plaintiffs were either members of the Bikini community in 1946 when the population was evacuated prior to the first American atomic bomb tests, direct descendants of such individuals, or people "who by traditional law and custom are recognized by the people of Bikini as members of their community." Am. Compl. filed July 17, 2006, ¶ 3. Pursuant to RCFC 23, plaintiffs bring this suit in the United States Court of Federal Claims, on their own behalf and on behalf of a class that

> consists of all living persons who were members of the Bikini community at the time of the 1946 evacuation of Bikini Atoll, all living direct descendants of those people who were evacuated, and all other persons who by traditional law and custom are recognized by the people of Bikini as members of their community.

Am. Compl. ¶ 11. Plaintiffs include the Senator for the people of Bikini and the Mayor, members, and officers of the Kili/Bikini/Ejit Local Government Council.

Plaintiffs plead six counts against the United States for occupation and use of Bikini Atoll. Plaintiffs allege: (1) a Fifth Amendment taking of plaintiffs' claims before the Nuclear Claims Tribunal for public use based on

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[3] By order entered on March 28, 2007, this case and *John* were consolidated for purposes of argument only.

defendant's "failure and refusal to fund adequately the award issued by the Nuclear Claims Tribunal on March 5, 2001," Am. Compl. ¶ 104 ("Count I"); (2) a breach of fiduciary duties created by an implied-in-fact contract that was formed by the conduct of the United States, "obligating defendant as a fiduciary to protect the health, well-being, economic condition and lands of the Bikini people," Am. Compl. ¶ 107 ("Count II"); (3) a breach of an implied-in-fact contract by "(a) failing or refusing to seek from Congress additional funds for the Nuclear Claims Tribunal sufficient to satisfy the ... award; (b) interfering with plaintiffs' efforts to secure additional funds for the Tribunal ...; and (c) failing and refusing to fund adequately the award issued by the Nuclear Claims Tribunal," Am. Compl. ¶ 116 ("Count III"); (4) a breach of the implied duties and covenants due to plaintiffs as "intended direct third-party beneficiaries of the Compact agreements signed between the defendant and the [Republic of the Marshall Islands] Government," Am. Compl. ¶ 119 ("Count IV"); (5) a takings claim for the use and occupation of Bikini Atoll by the Government based on the passage of the Compact of Free Association in 1986 and the failure adequately to fund the Nuclear Claims Tribunal ("Count V"); and (6) a breach of the fiduciary obligations imposed on the Government in 1946 through the formation of the Compact of Free Association between the United States and the Republic of the Marshall Islands (the "Compact") ("Count VI").

## FACTS

Judge Kenneth R. Harkins presided over these cases during the 1980s. He labored on them conscientiously and painstakingly for years. The undersigned, a new and young judge at the time, witnessed his dedicated efforts. The United States Court of Appeals for the Federal Circuit acknowledged the

thoroughness of Judge Harkins's opinions. Judge Harkins fully addressed the factual backdrop of this case; the Federal Circuit affirmed his decision, *see People of Enewetak v. United States*, 864 F.2d 134, 135 (Fed. Cir. 1988), *aff'g Peter v. United States*, 13 Cl. Ct. 691 (1987) (also stating facts relevant to plaintiffs' complaint in *Tomaki Juda et al. v. United States*, No 172-81L (Cl. Ct. filed Mar. 16, 1981)); and the parties neither have adduced new facts nor offered insight into the facts of record over the last nineteen years that would change them. This court adopts and restates, with minor modifications, the facts as found by Judge Harkins. *See Peter v. United States*, 6 Cl. Ct. 768, 770-73 (1984) (Enewetak Atoll; granting and denying, in part, motion to dismiss) ("*Peter I*"); *Juda v. United States*, 6 Cl. Ct. 441, 446-69 (1984) (Bikini Atoll; denying motion to dismiss) ("*Juda I* "). The facts subsequent to 1987 are undisputed, except where noted otherwise.

I. *Nuclear tests in the Marshall Islands*

1. *History of the Marshall Islands*

During the period June 30, 1946, to August 18, 1958, the United States conducted a series of nuclear tests in the Marshall Islands that included detonation of twenty-three atomic and hydrogen bombs at Bikini Atoll and forty-three atomic and hydrogen bombs at Enewetak Atoll. These tests necessitated removal of the inhabitants and their relocation to other islands and resulted in severe physical destruction at the atolls directly involved, as well as radioactive contamination at other parts of the Marshall island chain. The effects of the testing program included: annihilation of some islands and vaporization of portions of others; permanent resettlement with substantial relocation hardships to some inhabitants; exposure to high levels of radiation by some inhabitants; and widespread

contamination from radioactivity that renders some islands unuseable by man for indefinite future periods.

The Marshall Islands are a part of Micronesia, formerly a United Nations Trust Territory administered by the United States. The component parts of the Trust Territory of the Pacific Islands (the "Trust Territory") were the Marshall, Caroline, and Mariana island chains. The Trust Territory includes more than 2,000 islands and atolls dispersed throughout the Pacific Ocean, within an area approximately the size of the continental United States.

Until World War II, Micronesia was administered by Japan under a League of Nations Mandate. The islands came under the United States' control by military occupation in 1944. The United Nations and its Trusteeship Council were given jurisdiction over non-self-governing territories, and trusteeship agreements were executed between the United Nations and those signatory powers in de facto possession of such territories.

The United States was designated "administering authority" over the Trust Territory pursuant to an agreement ratified by the United Nations Security Council on April 2, 1947, and approved by Congressional joint resolution on July 18, 1947. 61 Stat. 3301, T.I.A.S. No. 1665. In 1947 military government was terminated, and administration of the Trust Territory was delegated to the Secretary of the Navy. Exec. Order No. 9,875, 3 C.F.R. 658 (1943-48 comp.). In 1951 some administrative responsibilities were transferred to the Interior Department. Exec. Order No. 10,265, 3 C.F.R. 766 (1949-53 comp.). By the Act of June 30, 1954, as amended (48 U.S.C. § 1681 (1982)), Congress directed:

> (a) Until Congress shall further provide for the government of the Trust Territory of the Pacific

> Islands, all executive, legislative, and judicial authority necessary for the civil administration of the Trust Territory shall continue to be vested in such person or persons and shall be exercised in such manner and through such agency or agencies as the President of the United States may direct or authorize.

Prior to 1962 responsibility for administration of the Trust Territory was divided between the Interior and Navy Departments. Effective July 1, 1962, the authority for civil administration of the Trust Territory was redelegated to the Secretary of the Interior, with the direction to carry out the obligations assumed by the United States as the administering authority "under the terms of the Trusteeship Agreement and the Charter of the United Nations." Exec. Order No. 11,021, 3 C.F.R. 600 (1959-63 comp.). *See generally Porter v. United States,* 496 F.2d 583, 587-90 (Ct. Cl. 1974), *cert. denied,* 420 U.S. 1004 (1975). Pursuant to this authority, the Secretary of the Interior established a Trust Territory Government (the "TTG"), which included executive, legislative, and judicial branches, with a High Commissioner as chief executive. Sec. Order No. 2,918, 34 Fed. Reg. 157 (1968).

In 1969 the United States began negotiations with the inhabitants of the Trust Territory directed to establishment of a framework for transition to constitutional self-government and future political relationships. During the negotiations the Trust Territory became divided into four governmental entities: Northern Mariana Islands, Republic of Palau, Federated States of Micronesia, and Republic of the Marshall Islands.

2. *Occupation of Bikini Atoll*

On November 10, 1945, the United States Joint Chiefs of Staff formed a subcommittee to develop plans

for a series of controlled tests to study the effects of atomic bombs on naval vessels and to search for an appropriate test site. In January 1946 the Joint Chiefs selected Bikini Atoll as the test site, and the President subsequently approved this choice. The American military governor of the Marshall Islands notified the Bikinians on February 10, 1946, that they must leave the atoll for the test. The Bikinians were told that they could return when the United States no longer needed the atoll for nuclear tests.

On March 7, 1946, the United States Navy moved the 167 inhabitants from Bikini Atoll by boat to Rongerik Atoll and left them with several weeks' supply of food and water. Rongerik Atoll has almost seventy-five percent less land area than Bikini, its coconut palms were inferior, and many species of fish customarily eaten at Bikini proved to be toxic in Rongerik's lagoon. Severe food shortages reduced the people to near starvation. In July 1947 a doctor reported that the Bikinians were "visibly suffering from malnutrition." In February 1948 an anthropologist sent by the United States government to examine the Bikinians found starvation conditions on Rongerik.

In March 1948 the Bikinians were moved by the United States Navy to temporary quarters on Kwajalein Atoll, and in September 1948 they were moved to Kili, an island 400 miles southwest of Bikini. Approximately 550 Bikinians continued to live on Kili when the original complaint was filed in 1981.

Kili is an island with approximately one-sixth of the land area of Bikini. It has neither a lagoon nor sheltered fishing grounds, and there is no protected anchorage. Access to the island is hazardous. Severe food shortages occurred on Kili in 1949, 1950, 1952, 1958, 1960, and 1968-69. Housing is inadequate, and health care is deficient.

The United States detonated twenty-three hydrogen and atomic bombs on Bikini Atoll between June 30, 1946, and July 22, 1958. Two tests were air drops, two devices were detonated under water, and other devices were detonated on anchored barges. The nuclear tests caused severe destruction. Radioactive mud was dumped on the islands and into the lagoon; coral, algae and shellfish on the reef were destroyed; and some of the islands were annihilated. In 1956 the Atomic Energy Commission (the "AEC") reported that all of the islands had received in varying degrees the resultant radioactive fusion and activation products. Testing at Bikini was a critical part of the United States' nuclear weapons development program; the Nuclear Testing Program cost at least $20 billion.

In 1968 an AEC Ad Hoc committee declared that Bikini was "once again safe for human habitation" and that exposures to radiation that would result from repatriation of the Bikini people "do not offer a significant threat to their health and safety." On August 12, 1968, the President of the United States announced that the major islands of Bikini were safe for human habitation and that the Bikinians could return.

In June 1969 eight Bikinians returned to the atoll to assist in resettlement; and six months later twenty-three workers moved from Kili to Bikini to begin construction of forty homes. More Bikinians were moved from Kili to Bikini in the early 1970s. In June 1971 the AEC reported that well water tests showed that from a radiological viewpoint "the water is safe to drink."

On October 10, 1975, the Bikinians brought suit in the United States District Court for the District of Hawaii seeking to compel the United States to conduct a comprehensive radiological survey of Bikini Atoll. Tests in 1977 showed that the level of strontium-90 in Bikini Island well water exceeded acceptable United States

standards. In April 1978 a medical team examination of islanders on Bikini showed an "incredible" one-year seventy-five percent increase in body burdens of radioactive cesium-137, causing United States scientists to conclude that the people likely had ingested the largest amounts of radiation of any known population.

The federal district court litigation was settled on October 27, 1978; the parties agreed that a radiological survey would be completed by December 31, 1978. A radiological survey was conducted in late 1978; a preliminary report, dated May 15, 1979, indicated that Bikini Atoll was not safe for human habitation.

In August 1978 the United States relocated some of the people from Bikini to Ejit Island in Majuro Atoll; others were moved back to Kili. No one has been allowed to reside at Bikini Atoll since that time. On July 1, 1979, the Interior Department reported to Congress that a final assessment of the radiological safety of Bikini and Eneu Islands was that Bikini Island could not be used for the next thirty to sixty years and that Eneu Island would be placed off limits as a place of residence for at least another twenty to twenty-five years.

When the United States commenced atomic testing on June 30, 1946, the rights of the parties were not memorialized in any contemporaneous written agreement between the United States and the people of Bikini. On April 27, 1951, the Trust Territory Government (the "TTG"), which had been created by the United States under the United Nations Trusteeship Agreement and certain Bikini Alabs (family heads), signed a document captioned "Release of Rights to Bikini Atoll" and a document captioned "Deed." In these documents the Alabs, who were not represented by counsel, for themselves and the people of Bikini gave a release to the High Commissioner of the TTG for "all of the right, title and interest of all the people of Bikini

Atoll, including the rights of the undersigned, to the Bikini Atoll." In exchange, the High Commissioner's deed granted from the public domain of the Trust Territory the island of Kili and three islets in Jaluit Atoll to "those persons who at the time of occupancy of Bikini by the United States owned any right, title and interest in the said Bikini Atoll."

On November 22, 1956, the High Commissioner of the TTG and the Bikini Alabs, who were not represented by counsel, executed a document captioned "Agreement in Principle Regarding Use of Bikini Atoll." This document recites that a meeting was held on Kili Island on November 9, 1956, to discuss a settlement for the past and future use of Bikini Atoll. Provisions in the agreement included: (1) the TTG would grant and convey full use rights from the public domain of the Trust Territory to Kili and the other three islets in Jaluit Atoll to "all of the people who possess land rights in Bikini Atoll, that is the commoners;" (2) the use rights in the aforesaid government lands would continue "until such time as it may be possible for the people to return to Bikini;" (3) the government of the Trust Territory and/or the government of the United States "shall possess the full use rights of the Bikini Atoll until such time as it determines it will no longer be necessary to occupy and use the said Atoll;" and (4) the sum of $325,000 shall be conveyed "to those persons, those commoners, who possess rights in Bikini Atoll." Of this sum $25,000 was to be paid at the time of signing, and $300,000 was to be placed "in a trust fund to be established and administered by the High Commissioner." The agreement also contained the following statement about claims by the Bikinians:

> Accordingly, the people and Alabs signing this agreement agree that any future claims by Bikinians based on the use of Bikini by the

> Governments of the United States or the Trust Territory or on the moving of the Bikini people from Bikini Atoll to Kili Island shall be against them and not against the Government.

On June 20, 1957, a document captioned "Use and Occupancy Agreement for Land in the Trust Territory of the Pacific Islands Under the Administrative Responsibility of the Department of the Interior" was recorded in Record Book No. 1 of the Marshall Islands District. This agreement recites it was "made as of the 15th day of April 1946" by the TTG and the United States, that the TTG was the "owner of exclusive use and occupancy rights for an indefinite period of time" of Bikini Atoll, and that the United States "desires to acquire the use and occupancy of the land" for an indefinite period of time.

This agreement provided that the TTG would grant and convey to the United States the exclusive right to occupy Bikini for an indefinite period and to save the United States "harmless from any and all claims" arising from such use, except for claims arising from negligence. In a section on conditions of use, the agreement provided (1) that the use by the United States "shall be consistent with the provisions and purposes of the Trusteeship Agreement;" (2) that on or about June 30, 1961, and on a similar date each five-year period thereafter, the United States and the TTG would "jointly review and determine the need for continuing the use," with final decision in the President of the United States; and (3) that, if a decision were made that a need for continued use and occupancy does not exist, the grant would terminate and "all interest in said land shall revert to" the TTG.

On March 17, 1970, the United States and the TTG executed a document captioned: "AGREEMENT ACKNOWLEDGING THE RETURN OF BIKINI ATOLL

TO THE TRUST TERRITORY OF THE PACIFIC ISLANDS SUBJECT TO CERTAIN RETENTION AREAS AND RIGHTS OF THE UNITED STATES OF AMERICA." This agreement, with minor exceptions, terminated the use and occupancy rights that had been given the United States by the TTG.

On January 24, 1979, the High Commissioner executed a document captioned "Quitclaim Deed" pursuant to the provisions of Order No. 3,030 of the Secretary of the Interior. This document purports to quitclaim and release all rights, title, and interest of the TTG to the "people of Bikini, that is the Commoners, their heirs and assigns, represented by those Alabs who executed" the document captioned "Agreement in Principle Regarding Use of Bikini Atoll" on or about November 22, 1956. The lands subject to the quitclaim were all of the lands located within Bikini Atoll, Kili Island, and certain islands of the Jaluit Atoll. On January 24, 1979, accordingly, Bikini Atoll was returned to the Bikinians.

II. *Juda I, Peter I, and Nitol I*

On March 16, 1981, plaintiffs first filed a complaint in the United States Claims Court now the United States Court of Federal Claims. *See Tomaki Juda et al. v. United States*, No. 172-81L (Cl. Ct. filed Mar. 16, 1981). The case "include[d] as plaintiffs the 1,004 members of the Bikini community as of May 1, 1981, and is concerned with the claims of the inhabitants of Bikini atoll." *Juda I* at 446. The plaintiffs in *Juda* alleged three causes of action:

> (1) an unlawful taking of Bikini Atoll from March 7, 1946, to January 24, 1979; (2) an unlawful taking that began on January 24, 1979, and would continue for the next 20 to 60 years; and (3) breaches of fiduciary responsibilities imposed in 1946, which do not depend upon the

> Trusteeship Agreement, but are claimed to arise from a contract implied-in-fact that obligates defendant to protect the health, well being and economic condition of the Bikini people.

Id. at 449.

Judge Harkins denied defendant's motion to dismiss in Juda I on October 5, 1984. Id. at 458. The court held, regarding counts 2 and 3, that "[s]ome of the claims clearly involve transactions that occurred after March 16, 1975.... Plaintiffs are not barred by limitations from an offer of proof as to the origin, nature, and content of the alleged implied-in-fact contract and fiduciary relationship, if any, with respect to these claims." Id. at 451. Regarding count 1, the court ruled that, "Congress has acted with respect to these plaintiffs and their rights." Id. at 458. The court concluded that "[a]ll of the restraints of the Bill of Rights are applicable to the United States wherever it has acted" and denied defendant's motion to dismiss for failure to state a claim. Id.

In conjunction with the filing of the complaint in Johannes Peter et al. v. United States, No. 461-82 (Cl. Ct. Sept. 15, 1982), thirteen other related cases were filed with the Claims Court regarding the effects of the Nuclear Testing Program in the Marshall Islands. Judge Harkins consolidated eleven complaints filed on September 9, 1981, and a twelfth complaint filed on July 26, 1982. *See Nitol v. United States*, 7 Cl. Ct. 405, 407 (1987) ("Nitol I"). The court explained:

> The claims of the inhabitants of the Bikini Atoll and Enewetak Atoll, sites used for atomic testing, factually are significantly different from each other, and both are distinguishable factually from the claims in the *Nitol* series of cases. For these reasons, the three types of

> claims have been handled separately. Only the *Nitol* series of cases have been consolidated.

*Juda I* at 446 (denying motion to dismiss).

The *Nitol* plaintiffs included "3,318 inhabitants of atolls and islands that were not used as nuclear test sites. These claims are based primarily on the effects of radiological fallout and contamination that resulted from the test program...." *Id.* The *Nitol* plaintiffs alleged three causes of action:

> (I) an unlawful taking of plant life, fish life, fishing rights, the land, the lagoon, the waters of the lagoon, and surrounding ocean of the atoll or island; (II) breach of an implied-in-fact contract between the people of the Marshall Islands and the United States that obligated the United States as a fiduciary to protect the health, well being and economic condition of the Marshallese people; and (III) breach of fiduciary duties arising out of the Trusteeship Agreement, which is characterized as a bilateral contract between the United States and United Nations.

*Nitol I* at 412. Judge Harkins granted defendant's motion to dismiss as to counts II and III and denied defendant's motion as to count I. *Id.* at 417.

The plaintiffs in the related case of *Peter* filed a complaint naming "17 individual plaintiffs who claim on their own behalf and on behalf of a class composed of all persons recognized as the Enewetak people." *Peter v. United States*, 6 Cl. Ct. 768, 769 (1984) (granting and denying, in part, motion to dismiss) ("*Peter I* "). Plaintiffs alleged four causes of action: "(1) unlawful taking of Enewetak Atoll [for the period from December 1947 to April 1980]; (2) breach of an implied-in-fact contract that imposed upon the United States responsibilities toward the Enewetak people in the

nature of a fiduciary; (3) failure to comply with the terms of the Trusteeship Agreement; and (4) breach of agreements between the United States and the Trust Territory Government." *Peter v. United States*,13 Cl. Ct. 691, 691-92 (1987) ( "*Peter II* ") (dismissing complaint based on withdrawal of jurisdiction). On November 30, 1984, Judge Harkins granted defendant's motion to dismiss regarding Counts I, III, and IV and denied the motion to dismiss regarding plaintiffs' implied-in-fact contract claim. *Peter I* at 781.

*Peter I* concluded that "[f]or purposes of application of the statute of limitations, in a claim for just compensation for a taking, August 22, 1958, must be the 'taking date' of Enewetak Atoll, in accordance with the doctrine announced in [*United States v. Dickinson*, 331 U.S. 745 (1947)]." *Id.* at 775. Based on this determination, the court dismissed plaintiffs' first cause of action for failure to comply with the six-year statute of limitations in the Tucker Act, 28 U.S.C. § 2501 (1986). *Peter I* dismissed the third count based on 28 U.S.C. § 1502 (1986), holding that "[t]he Trusteeship Agreement is a treaty, and it has been made with a recognized unit of foreign nations. [The *Peter* p]laintiffs' claim in count III clearly grows out of and is dependent upon that treaty.... Such relationship bars jurisdiction in this court." *Id.* at 779 (citing *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 903 (Ct. Cl. 1976); *S.N.T. Fratelli Gondrand v. United States*, 166 Ct. Cl. 473, 478 (1964)). Regarding plaintiffs' implied-in-fact contract claim, the court held that "plaintiffs have alleged facts which for purposes of a motion to dismiss must be accepted as true. The facts, as alleged, establish conduct that is adequate to establish the requisite elements of a contract implied-in-fact." *Peter I* at 779; *see also id.* at 692 ("It was determined that plaintiffs were not barred by the statute of limitations from an offer of proof as to the origin, nature, and content of the alleged implied-in-

fact contract, and that count II stated a breach of contract claim within the Tucker Act jurisdiction of this court.") Finally, the court held that count IV of plaintiffs' claims, which "alleges plaintiffs are third party beneficiaries to the overall transaction involved in the September 16, 1976, agreement between the TTG and the United States," was subject to dismissal because "the September 16, 1976, transactions did not confer rights as third party beneficiaries to plaintiffs." *Peter I* at 780, 781.

III. *The Compact, the Section 177 Agreement, and the Nuclear Claims Tribunal*

This section restates, with minor modifications, portions of the discussion in *Juda v. United States*, 13 Cl. Ct. 667, 671-77 (1987) (dismissing complaint based on withdrawal of jurisdiction) ("*Juda II* "). From the war-time occupation of Micronesia in 1944 to approval of the Trust Territory Agreement on July 18, 1947, United States military authorities controlled the Pacific Islands. In 1947 military government was terminated, and administration of the Trust Territory was delegated to the Secretary of the Navy. Some elements of the takings claims and breach of contract claims in *Juda* and *Peter* occurred during this period.

At the end of World War II, little doubt existed that Micronesia would remain under United States control. Whether to annex the area or to place it under the trusteeship system of the United Nations was debated vigorously. Military leaders and the Secretary of War urged outright annexation for strategic reasons. The Secretary of State, on the other hand, urged that Micronesia be made a trusteeship in order to implement the principle of no territorial aggrandizement that had been expressed in the Atlantic Charter and the Cairo Declaration. Disagreement within the United States Government was not resolved until structures were

developed in the United Nations relationship that assured the United States would have full control and full strategic rights in the area. These concerns resulted in a procedure that provided two categories of trusteeship: (1) non-strategic trust areas, overseen by the General Assembly and the United Nations Trusteeship Council (the "UNTC") and (2) territories designated as strategic trust areas, overseen by the Security Council and the UNTC. *See generally* "Foreign Relations of the United States, Diplomatic Papers: Conferences at Malta and Yalta 1945," at 92 (1955); R. Russell & J. Muther, *A History of the United Nations Charter*, 578 (1958).

Eleven trusteeship agreements were approved under the United Nations Charter; ten were for non-strategic trusts, and one, the Trusteeship Agreement for the Pacific Islands, was designated as a strategic trust. The Trusteeship Agreement represents the only instance where the United States has assumed responsibility for administering a foreign territory under the authority of an international organization.

The United Nations Charter, in Articles 75 through 85, provides for the international trusteeship system. Article 76(b) is a recognition of the principle that an administering authority is accountable to the international community for administration of the trust area. It obligates the administering authority to promote the political advancement of the inhabitants of the trust territories and their progressive development towards self-government or independence. Article 83 provides that the Security Council would exercise all functions of the United Nations relating to strategic areas. The Charter, however, does not authorize specifically the Security Council to approve the termination of a strategic trusteeship agreement. Article 83 provides:

1. All functions of the United Nations relating to

strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

The Trusteeship Agreement is a treaty in the nature of a bilateral contract between the Security Council and the United States. Article 6 of the Trusteeship Agreement obligates the United States, in the discharge of its obligations under Article 76(b) of the Charter, to foster the development of such political institutions as are suited to the trust territory and to promote the development of the inhabitants towards self-government or independence, as may be appropriate to the particular circumstances of the territory and its peoples. The United States agreed to give the inhabitants of the Trust Territory a progressively increasing share in the administrative services in the territory and to develop their participation in government.

Article 15 of the Trusteeship Agreement provides: "The terms of the present agreement shall not be altered, amended or terminated without the consent of the administering authority." During the negotiations leading to the agreement, the representative of the Soviet Union objected to this provision and proposed

language that would have permitted the Security Council unilaterally to alter, amend, or terminate the Agreement. The United States representative refused to agree to the provision that would give the Security Council such power, and, in order to protect United States strategic interests, he insisted that no termination could occur without the consent of the United States.

During the 1960s, in administering the Trusteeship Agreement, the United States initiated efforts to prepare the people for the transition to constitutional self-government. In 1965 the Congress of Micronesia was created, and elected leaders from all parts of the Trust Territory met to discuss common problems and to explore the concept of political unity. Initially, the United States encouraged, and the Trust Territory leaders explored, the possibility of commonwealth status for the various island groups. This proposal was not accepted generally. Further, differences in geography, history, and culture made it difficult to create a single governmental unit that included all of the inhabitants of the Trust Territory. Four separate political entities ultimately were established.

On March 24, 1976, the United States approved the "Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America." Pub.L. No. 94-241, 90 Stat. 263 (1976) (codified as amended at 48 U.S.C. § 1681 (1982)). The constitution for the Federated States of Micronesia (the "FSM") was ratified on July 12, 1978. The Republic of the Marshall Islands (the "RMI") approved its constitution in a referendum on March 1, 1979, and inaugurated a parliamentary constitutional government on May 1, 1979. The constitution for the Republic of Palau was approved at a United Nations-observed referendum on July 9, 1979. The Palau

legislature subsequently voided the results of this referendum, and a second referendum was scheduled. The constitution was defeated in a referendum held October 23, 1979. In April 1980 the High Commissioner approved a Palau public law that provided a timetable for the installation of a government under the original constitution. Under the terms of the bill, the Palau constitution took effect on January 1, 1981.

After July 1, 1962, the Secretary of the Interior had exercised all necessary powers of civil government provided by the Trusteeship Agreement. On April 25, 1979, the Secretary recognized the new governmental entities of the Federated States of Micronesia, the Marshall Islands, and Palau and delegated to each the executive, legislative, and judicial functions of the government of the Trust Territory of the Pacific Islands. Secretary Order No. 3039, Apr. 25, 1979. Order No. 3039 provided that the High Commissioner shall continue to exercise all authority necessary to carry out United States' obligations under the 1947 Trusteeship Agreement. This retained authority specifically listed eight categories of administrative functions, including Budget, Accounting, Relations with other United States Government Agencies, and Foreign Governments. All laws of the three governmental units were required to be submitted to the High Commissioner for approval.

A Compact of Free Association was negotiated with each of the individual states. The governments of the United States and the Marshall Islands and the governments of the United States and the Federated States of Micronesia initialed the Compact of Free Association on October 31, 1980. The Compact of Free Association with the government of Palau was initialed on November 17, 1980. Further reviews followed, and the final version of the Compact of Free Association with the Republic of Palau was signed on August 26,

1982, and with the Federated States of Micronesia, on October 1, 1982. The United States and the RMI signed the Compact and its related agreements on June 25, 1983.

After execution by the signatory governments, the Compacts of Free Association were presented to the people in plebiscites monitored by international observers from the United Nations Trusteeship Council. The Federated States of Micronesia plebiscite was held in June 1983, and the Compact was approved by seventy-nine percent. The RMI plebiscite was held in September 1983, and the Compact was approved by fifty-eight percent. In Palau plebiscites were held on February 10, 1983, and on modified versions on September 4, 1984, and February 1, 1986. On February 24, 1986, the President of the Republic of Palau certified to the United States that the Compact of Free Association had been approved.

The Compact was submitted to Congress on March 30, 1984. Action on the legislation was not completed in the 98th Congress, and the Compact was resubmitted to the 99th Congress on February 20, 1985. Hearings were held in each body, and each passed differing versions. The legislation was not referred to a conference committee; differences were resolved in meetings between representatives from each body and from the Administration. The final version, House Joint Resolution No. 187, was presented without a Conference Report; it was approved by the House of Representatives on December 11, 1985, and by the Senate on December 13, 1985. It was signed by the President on January 14, 1986. Pub.L. No. 99-239, 99 Stat. 1770 (1986). By its terms (Section 471(c)), the Compact has the force and effect of a statute under the laws of the United States.

The legislation that approves the Compact of Free

Association with the RMI and the FSM bears the title "Compact of Free Association Act of 1985" (the "Compact Act"). It contains Titles I through V. Title I includes provisions that relate to approval of the Compact; interpretation of, and United States policies regarding, the Compact; and supplemental provisions. Title II contains the terms of the Compact of Free Association as signed by the parties and approved in the plebiscites. Compact Titles III, IV and V relate to Pacific policy reports, clarification of certain trade and tax provisions, and the Compact with the Republic of Palau.

A number of provisions relate to the effective date of the Compact. Section 101(b) of the Compact Act provides:

> (b) MARSHALL ISLANDS.-The Compact of Free Association set forth in title II of this joint resolution between the United States and the Government of the Marshall Islands is hereby approved, and Congress hereby consents to the subsidiary agreements as set forth on pages 115 through 391 of House Document 98-192 of March 30, 1984, as they relate to such Government. Subject to the provisions of this joint resolution, the President is authorized to agree, in accordance with section 411 of the Compact, to an effective date for and thereafter to implement such Compact, having taken into account any procedures with respect to the United Nations for termination of the Trusteeship Agreement.

Section 411 of the Compact provides:

> This Compact shall come into effect upon mutual agreement between the Government of the United States, acting in fulfillment of its responsibilities as Administering Authority of the Trust Territory of the Pacific Islands, and

the Government of the Marshall Islands or the Federated States of Micronesia and subsequent to the completion of the following:

(a) Approval by the Government of the Marshall Islands or the Federated States of Micronesia in accordance with its constitutional processes.

(b) Conduct of the plebiscite referred to in Section 412.

(c) Approval by the Government of the United States in accordance with its constitutional processes.

Section 171 of the Compact suspends the laws of the United States to the Trust Territory on the effective date. Section 171 provides:

> Except as provided in this Compact or its related agreements, the application of the laws of the United States to the Trust Territory of the Pacific Islands by virtue of the Trusteeship Agreement ceases with respect to the Marshall Islands and the Federated States of Micronesia as of the effective date of this Compact.

Section 127 of the Compact provides:

> Except as otherwise provided in this Compact or its related agreements, all obligations, responsibilities, rights and benefits of the Government of the United States as Administering Authority which have resulted from the application pursuant to the Trusteeship Agreement of any treaty or other international agreement to the Trust Territory of the Pacific Islands on the day preceding the effective date of this Compact are no longer assumed and enjoyed by the Government of the United States.

Section 177 of the Compact provides a procedure for

the disposition of claims that have resulted from the Nuclear Testing Program. A separate agreement between the United States and the RMI is authorized to provide for the settlement of all such claims (the "Section 177 Agreement"). Section 177 provides that "[t]his separate agreement shall come into effect simultaneously with this Compact and shall remain in effect in accordance with its terms." Article XIII, section 1 of the Section 177 Agreement provides: "This Agreement shall come into effect simultaneously with the Compact in accordance with Section 177 of the Compact."

Section 177 of the Compact provides:

> (a) The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958.
>
> (b) The Government of the United States and the Government of the Marshall Islands shall set forth in a separate agreement provisions for the just and adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens and which have not as yet been compensated or which in the future may arise, for the continued administration by the Government of the United States of direct radiation related medical surveillance and treatment programs and radiological monitoring activities and for such

> additional programs and activities as may be mutually agreed, and for the assumption by the Government of the Marshall Islands of responsibility for enforcement of limitations on the utilization of affected areas developed in cooperation with the Government of the United States and for the assistance by the Government of the United States in the exercise of such responsibility as may be mutually agreed. This separate agreement shall come into effect simultaneously with this Compact and shall remain in effect in accordance with its own terms.
>
> (c) The Government of the United States shall provide to the Government of the Marshall Islands, on a grant basis, the amount of $150 million to be paid and distributed in accordance with the separate agreement referred to in this Section, and shall provide the services and programs set forth in this separate agreement, the language of which is incorporated into this Compact.

The Compact Act approves Compact Section 177 and, by reference, specifically incorporates the provisions of the Section 177 Agreement into the Compact Act. Section 103(g) of the Compact Act provides:

> (g) ESPOUSAL PROVISIONS.-(1) It is the intention of the Congress of the United States that the provisions of section 177 of the Compact of Free Association and the Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact (hereafter in this subsection referred to as the "Section 177 Agreement") constitute a

full and final settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred except insofar as provided for in the Section 177 Agreement.

(2) In furtherance of the intention of Congress as stated in paragraph (1) of this subsection, the Section 177 Agreement is hereby ratified and approved. It is the explicit understanding and intent of Congress that the jurisdictional limitations set forth in Article XII of such Agreement are enacted solely and exclusively to accomplish the objective of Article X of such Agreement and only as a clarification of the effect of Article X, and are not to be construed or implemented separately from Article X.

The Section 177 Agreement provides for the establishment and operation by the RMI of a Claims Tribunal (the "Claims Tribunal"). The Claims Tribunal was given "jurisdiction to render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based on, arise out of, or are in any way related to the Nuclear Testing Program...." Article IV, section 1(a) of the Section 177 Agreement includes the following limitation: "This section confers in the Claims Tribunal no jurisdiction over the United States, its agents, employees, contractors, citizens or nationals with respect to claims of the Government, citizens or nationals of the Marshall Islands arising out of the Nuclear Testing Program."

Article X, Section 1 of the Section 177 Agreement provides:

Section 1-Full Settlement of All Claims

This Agreement constitutes the full settlement of all claims, past, present and future, of the

> Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, its agents, employees, contractors and citizens and nationals, and of all claims for equitable or any other relief in connection with such claims including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions.

Article XII of the Section 177 Agreement provides:

> All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed.

On May 28, 1986, the UNTC, in Resolution No. 2183, reaffirmed that the peoples of the Northern Mariana Islands, the RMI, the FSM, and Palau had "freely exercised their right to self-determination in plebiscites observed by visiting missions of the Trusteeship Council." The UNTC determined that the United States as the Administering Authority "has satisfactorily discharged its obligations under the terms of the Trusteeship Agreement and that it is appropriate for that Agreement to be terminated." The UNTC requested that the United States, in consultation with the respective governments, to agree on a date no later than September 30, 1986, for the full entry into force of the Compact of Free Association and the Commonwealth Covenant and to inform the Secretary

General of the United Nations of that date. The official records of the UNSC for the period ending June 30, 1986, show that UNTC Resolution No. 2183 was reported to the Security Council.

Between May and October 1986, representatives of the United States and representatives of the RMI negotiated to establish an effective date for the Compact. On October 10, 1986, the parties executed an agreement providing, pursuant to Section 411 of the Compact, that the effective date of the Compact would be October 21, 1986.

On October 16, 1986, the President issued Executive Order No. 12,569 to provide for changes in the responsibilities of United States officials when the Compact became effective. The Secretary of State was made responsible for conducting government-to-government relations with the RMI, the FSM, and the Republic of Palau. The responsibilities of the Secretary of the Interior were redefined to include:

> Sec. 2 Responsibility of the Secretary of the Interior. The Secretary of the Interior shall be responsible for seeking the appropriation of funds for and, in accordance with the laws of the United States, shall make available to the Freely Associated States the United States economic and financial assistance appropriated pursuant to Article I of Title Two of the Compact; the grant, service, and program assistance appropriated pursuant to Article II of Title Two of the Compact; and all other United States assistance appropriated pursuant to the Compact and its related agreements. The Secretary shall coordinate and monitor any program or any activity by any department or agency of the United States provided to the Freely Associated States and shall coordinate

and monitor related economic development planning. This Section shall not apply to services provided by the Department of Defense to the Freely Associated States or to activities pursuant to Section 1 of this Order, including activities under the Peace Corps Act.

Section 8, Supersession and Savings Provisions, of the Executive Order provides:

(a) Subject to the provisions of Section 9 of this Order, prior Executive orders concerning the former Trust Territory of the Pacific Islands are hereby superseded and rendered inapplicable, except that the authority of the Secretary of the Interior as provided in applicable provisions of Executive Order No. 11021, as amended, shall remain in effect, in a manner consistent with this Order and pursuant to section 105(c)(2) of the Act, to terminate the trust territory government and discharge its responsibilities, at which time the entirety of Executive Order No. 11021 shall be superseded.

(b) Nothing in this Order shall be construed as modifying the rights or obligations of the United States under the provisions of the Compact or as affecting or modifying the responsibility of the Secretary of State and the Attorney General to interpret the rights and obligations of the United States arising out of or concerning the Compact.

By letter dated October 23, 1986, the United States Permanent Representative to the United Nations notified the Secretary General of the United Nations that, as a consequence of consultations held between the United States Government and the Government of the RMI, "agreement has been reached that October 21, 1986, is the date upon which the Compact of Free

Association with the Marshall Islands enters fully into force."

On November 3, 1986, the President announced in Proclamation No. 5564 that, as of that date, the United States "has fulfilled its obligations under the Trusteeship Agreement with respect to the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, and the Federated States of Micronesia, and they are self-governing and no longer subject to the Trusteeship." Proclamation No. 5564 further provided:

> Section 1. I determine that the Trusteeship Agreement for the Pacific Islands is no longer in effect as of October 21, 1986, with respect to the Republic of the Marshall Islands, as of November 3, 1986, with respect to the Federated States of Micronesia, and as of November 3, 1986, with respect to the Northern Mariana Islands. This constitutes the determination referred to in Section 1002 of the Covenant.

In keeping with its decision that the RMI was a sovereign self-governing state, on April 22, 1987, the President's nomination of the United States diplomatic representative to the Marshall Islands was announced; on May 4, 1987, the Government of the RMI was notified formally that the general relations between the two governments would be governed by international law, as reflected in the Vienna Convention on Diplomatic Relations and that the RMI representatives would be accorded status commensurate with the heads of diplomatic missions, as this expression is used in the Convention. On June 3, 1987, the United States Senate gave its consent to appointment of the President's nominee.

IV. *Juda II, Peter II, Nitol II, and People of Enewetak*

On March 4, 1986, defendant filed motions to dismiss in *Juda, Nitol,* and *Peter,* characterizing the claims as posing a non-justiciable political question after the passage of the Compact and the execution of the Section 177 Agreement. *See Juda v. United States,* 13 Cl. Ct. 667, 669 (1987) ("*Juda II* "). On November 4, 1986, defendant filed amended motions to dismiss adding as a ground the lack of subject matter jurisdiction due to the effect of the withdrawal of jurisdiction contained in the Section 177 Agreement. *Id.* at 670.

On November 10, 1987, Judge Harkins dismissed the surviving claims in *Juda* for lack of subject matter jurisdiction, issuing dismissals of the *Peter* and *Nitol* cases on the same date that relied on the same rationale. *See Juda II* at 690 ("The consent of the United States to be sued in the Claims Court on plaintiffs' taking claims and breach of contract claims that arise from the United States' nuclear testing program in the Marshall Islands has been withdrawn."); *see also Peter v. United States,* 13 Cl. Ct. 691, 692 (1987) ("The withdrawal by the United States of its consent to be sued, as set forth in the memorandum of decision in the *Juda* case, applies to plaintiffs' remaining claims in this case.") ("*Peter II* "); *Nitol v. United States,* 13 Cl. Ct. 690, 691 (1987) ("*Nitol II* ") (same as *Peter II* ). The court found that "the Compact of Free Association, the Section 177 Agreement, and Articles X, XI, and XII of that agreement, went into effect on October 21, 1986." *Juda II* at 682-83. The court found that "[t]he RMI and the United States unquestionably intended that the Section 177 Agreement would be a complete settlement of all claims arising from the nuclear testing program." *Id.* at 684. Concluding that the Section 177 Agreement and the Compact validly withdrew consent to sue the United States in the Claims Court, the court dismissed plaintiffs' claims. *Id.* at 690. Nevertheless, Judge

Harkins stated that it was "premature" for the court to hear plaintiffs' objections to the adequacy of the compensation:

> Whether the compensation, in the alternative procedures provided by Congress in the Compact Act, is adequate is dependent upon the amount and type of compensation that ultimately is provided through these procedures. Congress has recognized and protected plaintiffs' rights to just compensation for takings and for breach of contract. The settlement procedure, as effectuated through the Section 177 Agreement, provides a "reasonable" and "certain" means for obtaining compensation. Whether the settlement provides "adequate" compensation cannot be determined at this time.
>
> ....
>
> .... This alternative procedure for compensation cannot be challenged judicially until it has run its course.

*Id.* at 689.

The Federal Circuit consolidated the appeals of the Claims Court in *Peter II, Juda II,* and *Nitol II* in *People of Enewetak v. United States,* 864 F.2d 134 (Fed. Cir. 1988). The appeal of *Juda II* was dismissed with prejudice "upon the unopposed motion of claimants, following the enactment of special legislation which appropriated funds for the benefit of the People of Bikini." *People of Enewetak,* 864 F.2d at 135 n.1; *see People of Bikini v. United States,* 859 F.2d 1482 (Fed. Cir. 1988) (order dismissing case).

The settlement in *People of Bikini* was signed into law on September 27, 1988, and provided:

> That in full satisfaction of the obligation of the

United States to provide funds to assist in the resettlement and rehabilitation of Bikini Atoll by the People of Bikini, to which the full faith and credit of the United States is pledged pursuant to section 103(*l* ) of Public Law 99-239, the United States shall deposit $90,000,000 into the Resettlement Trust Fund for the People of Bikini established pursuant to Public Law 97-257, and governed pursuant to the terms of such trust instrument, such deposit to be installments of $5,000,000 on October 1, 1988; $22,000,000 on October 1, 1989; $21,000,000 on October 1, 1990; $21,000,000 on October 1, 1991; and $21,000,000 on October 1, 1992: Provided further, That the terms of such Resettlement Trust Fund are hereby modified to provide that corpus and income may be expended for rehabilitation and resettlement of Bikini Atoll, except that the Secretary may approve expenditures not to exceed $2,000,000 in any year from income for projects on Kili or Ejit: Provided further, That one year prior to completion of the rehabilitation and resettlement program, the Secretary of the Interior shall report to Congress on future funding needs on Bikini Atoll. Unless otherwise determined by Congress, following completion of the rehabilitation and resettlement program, funds remaining in the Resettlement Trust Fund in excess of the amount identified by the Secretary as required for future funding needs shall be deposited in the United States Treasury as miscellaneous receipts. Upon completion of those needs, the Resettlement Trust Fund shall be extinguished and all remaining funds shall be deposited in the United States Treasury as

> miscellaneous receipts. The payment and use of funds in accordance herewith is for the sole purpose of implementing and fulfilling the terms of the Section 177 Agreement referred to in section 462(d) of the Compact of Free Association between the United States and the Republic of the Marshall Islands, including Article VI, section 1, and Articles X and XII, thereof. Payments pursuant hereto shall be made only upon: One, voluntary dismissal with prejudice of *Juda et al. v. the United States,* No. 88-1206 (Fed. Cir.); and two, submission of written notice to the United States and the Republic of the Marshall Islands, executed by duly-authorized representatives acting on their behalf, that the People of Bikini accept the obligations and undertaking of the United States to make the payments prescribed by this Act, together with the other payments, rights, entitlements and benefits provided for under the Section 177 Agreement, as full satisfaction of all claims of the People of Bikini related in any way to the United States nuclear testing program in accordance with the terms of the Section 177 Agreement.

Pub. L. No. 100-446, 102 Stat. 1774, 1798 (1988).

The Federal Circuit affirmed the decisions of the Claims Court in *Peter II* and *Nitol II*, holding:

> The [Compact] Act and the section 177 Agreement, provide, in perpetuity, a means to address past, present and future consequences, including the resolution of individual claims, arising from the United States nuclear testing program in the Marshall Islands between June 30, 1946 and August 18, 1958. Congress intended the alternative procedure to be

> utilized, and we are unpersuaded that judicial intervention is appropriate at this time on the mere speculation that the alternative remedy may prove to be inadequate.

*People of Enewetak*, 864 F.2d at 136. The court stated that a determination of the adequacy of the alternative procedure for compensation was not required "in advance of the exhaustion of the alternative provided" and adopted the "[Claims Court's] more extensive analysis in *Juda v. United States*, 13 Cl. Ct. 667 (1987), relating to the issues discussed." *People of Enewetak* 864 F.2d at 137.

On August 22, 1983, approximately 3,000 present and former residents of the RMI located downwind from the nuclear test sites filed a claim seeking damages for personal injuries and death pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2674 (2000) (the "FTCA"). The district court held that "the RMI's espousal and settlement of the claims were not reviewable by the courts of the United States and that the Court lacked 'jurisdiction over plaintiffs' claims, pursuant to valid law and in conjunction with non-reviewable foreign relations decisions.' " *Antolok v. United States*, 873 F.2d 369, 372 (9th Cir. 1989) (quoting *Antolok v. United States*, No. 83-2471, slip op. at 8 (D.D.C. Jun. 16, 1987)). The United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the lower court, holding that, while "the Federal Tort Claims Act, 28 U.S.C. § 1346(b), initially provided a waiver of immunity for this tort action, Congress withdrew their consent for this type of claim in ratifying the Compact and the Section 177 Agreement...." 873 F.2d at 374. The court compared the tort claim brought to a potential takings claim, stating that "even if the legislation amounted to an actual taking of property ... then the substitution of another remedy is compensation

therefor." *Id.* at 378. Nevertheless, the court noted that, "[i]f there is an uncompensated or inadequately compensated taking, then plaintiffs' remedy is in the Claims Court under the Tucker Act, 28 U.S.C. § 1491(a)(1), not in District Court under the Federal Tort Claims Act." *Id.* As no valid constitutional claim was before the court, it declined to review "the difficult question of whether inferior courts may be barred by an act of Congress from review of constitutional challenges to statutes." *Id.* (citations omitted).

Judge Sentelle, who authored the panel's opinion, set forth his separate views[4] with respect to the role of the political question doctrine:

> [E]ven if we err in our interpretation of [the Compact] Act, I would not reach the merits but would conclude that the District Court was without jurisdiction over this matter of international relations by reason of the political question doctrine.
>
> ....
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> .... While I do not deny that the plaintiffs herein raise good faith objections to the decision of the Executive ..., our deferral to the political branches in political questions is not limited to those where they are correct. It would require our invasion of their sphere for us to make the determination that they were wrong,

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[4] Chief Judge Wald and Judge Starr did not join Judge Sentelle as to section II.B of the opinion in *Antolok*, which discusses the political question doctrine. *See Antolok*, 873 F.2d at 379. Chief Judge Wald filed a separate opinion concurring in the result to express an alternative application of the political question doctrine. *See id.* at 385 (Wald, J., concurring).

> and it is against that very invasion that the political question doctrine protects the political realm from judicial invasion.

*Id.* at 379, 383.

Then-Chief Judge Wald's special concurrence distinguished the takings claim raised in *Antolok* from the takings claims raised in *People of Enewetak:* "Plaintiffs responded to the government's defense (lack of jurisdiction) by arguing that a withdrawal of jurisdiction would constitute an uncompensated taking; the property allegedly taken here is the plaintiffs' cause of action in tort." *Antolok,* 873 F.2d at 393 n. 15. In contrast, the takings claim in *People of Enewetak* involved "property allegedly taken [that included] plaintiffs' lands, homes, and businesses." *Id.*

V. *The Nuclear Claims Tribunal decisions and the Changed Circumstances Request*

The Nuclear Claims Tribunal (the "NCT") was established in 1987 when the Nitijela, the legislative body of the RMI, passed the Nuclear Claims Tribunal Act (the "NCTA"). On September 13, 1993, the People of Bikini filed a class action claim in the NCT seeking damages for the loss of use of Bikini Atoll, restoration for a radiological cleanup of the contaminated land, and consequential damages and hardships suffered by the People of Bikini.

The NCT heard the claims of the People of Bikini over a seven-year period. On March 5, 2001, the NCT issued a decision awarding the People of Bikini $563,315,500 for property and consequential damages, after deducting $194,725,000 for compensation and restoration costs already received by plaintiffs. The NCT's award comprised three categories: (1) "$278,000,000 for past and future loss of Bikini Atoll;" (2) $251,500,000 for clean up and rehabilitation of Bikini Atoll; and (3) "$33,815,500 for the hardships

suffered by the People of Bikini as a result of their relocation attendant to their loss of use." PX 4 at 35, 43-44. The NCT applied principles of the U.S. Constitution in rendering its decision:

> Although this is not an eminent domain proceeding nor a claim under constitutional provisions for just compensation for a taking of property for public use, since neither the U.S. or Republic of the Marshall Islands (RMI) government is a party to this proceeding, principles of "just compensation" to the extent that they aid in a determination of what is necessary to make claimants whole, should be referenced by this Tribunal where appropriate.

*Id.* at 6.

Consequently, the NCT calculated past damages for loss of use in the amount of $163,730,737, using past and future loss amounts based on annual rental values for the land occupied by the United States. Compensation for thirty years' future denied use was awarded in the amount of $98,342,763. Taking into account payments that the People of Bikini were scheduled to receive shortly after the issuance of its decision, the NCT determined that the total value for past and future loss was $278,000,000 (rounded). Restoration costs were awarded in the amount of $360,500,000 for the following purposes:

> (1) soil excavation and removal; (2) periodic clearing of land of underbrush prior to potassium applications; (3) purchase and periodic application of potassium/potassium fertilizer; (4) soil management that ensures proper dosage of potassium/potassium fertilizer; (5) a comprehensive surveillance program involving soil and crop samples analyses and boiassays; and (6)disposal of

> contaminated soil through construction of an elevated and sealed causeway.

PX 4 at 35. The NCT deducted $19,000,000, *see* Pub. L. No. 97-257, 96 Stat. 818 (1998), and $90,000,000, *see* Pub. L. No. 100-446, from its total award to account for additional compensation already awarded to the People of Bikini. After considering these payments, the NCT awarded them $251,500,000 for clean-up and rehabilitation. Finally, the NCT awarded "$33,815,500 for the hardships suffered by the People of Bikini as a result of their relocation attendant to their loss of use." PX 4 at 43-44. In addition, the NCT "established a post-judgment interest rate of 7% per annum for the loss of use and restoration of land." Am. Compl. ¶ 85.

The NCT issued its decision regarding the claims of the Enewetak people on April 13, 2000. The decision was amended on May 5, 2000, and on August 3, 2000. Ultimately, the NCT determined that the Enewetak people were entitled to a total of $385,894,500, plus interest; $244,000,000 for past and future loss of use; $107,810,000 for restoration costs; and $34,084,500 for hardship suffered.

Thus, the total amounts awarded to the People of Bikini and the Enewetak people by the NCT include the following components:

*Enewetak people*:

| | |
|---|---|
| Loss of use: | $244,000,000 + 7% interest |
| Restoration: | $107,810,000 + 7% interest |
| Hardship: | $34,084,500 |
| **TOTAL:** | **$385,894,500 + interest** |

*People of Bikini*:

| | |
|---|---|
| Loss of use: | $278,000,000 + 7% interest |

| | |
|---|---|
| Restoration: | $251,500,000 + 7% interest |
| Hardship: | $33,815,500 |
| **TOTAL:** | **$563,315,500 + interest** |

In February 2002 the NCT made a payment of $1,078,750 to the Enewetak people and $1,491,809 to the People of Bikini, amounts which constituted 0.25% of their respective awards. In February 2003 the NCT made another partial payment of 0.125% of the total awarded amount, giving $568,733 to the Enewetak people and $787,370 to the People of Bikini. Since February 2003, the NCT has not rendered any further payments to either the Enewetak people or the People of Bikini. The NCT has exhausted the $45.75 million allocated in the Section 177 Agreement with respect to payments for personal injury awards that exceed $80 million. The $150-million trust fund established has been reduced to a current balance of less than $1.8 million.

In 2002 the RMI retained former United States Attorney General Richard Thornburgh to undertake an independent examination of the NCT's processes in response to concerns raised by the United States Government regarding the transparency of the NCT's operations. Mr. Thornburgh issued a report in January 2003 (the "Thornburgh Report") concluding "that the NCT fulfilled the task for which it was created in a reasonable, fair and orderly manner, and with adequate independence." Am. Compl. ¶ 153. The Thornburgh Report stated that "[i]t is our judgment that the $150 million trust fund initially established in 1986 is manifestly inadequate to fairly compensate the inhabitants of the Marshall Islands for the damages they suffered as a result of the dozens of U.S. nuclear tests that took place in their homeland." Am. Compl. ¶ 154

(quoting Thornburgh Report).

Article IX of the Section 177 Agreement (the "Changed Circumstances provision") provides:

> If loss or damage to property and person of the citizens of the Marshall Islands, resulting from the Nuclear Testing Program, arises or is discovered after the effective date of this Agreement, and such injuries were not and could not reasonably have been identified as of the effective date of this Agreement, and if such injuries render the provisions of this Agreement manifestly inadequate, the Government of the Marshall Islands may request that the Government of the United States provide for such injuries by submitting such a request to the Congress of the United States for its consideration. It is understood that this Article does not commit the Congress of the United States to authorize and appropriate funds.

Pursuant to Article IX, entitled "Changed Circumstances," the RMI presented a "Petition Presented to the Congress of the United States of America Regarding Changed Circumstances Arising from U.S. Nuclear Testing in the Marshall Islands" (the "Changed Circumstances Request") on September 11, 2000. Am. Compl. ¶ 163. The Changed Circumstances Request was resubmitted to Congress on November 14, 2001.

The Senate Energy and Natural Resources Committee and the House Resources Committee requested that an interagency group evaluate the Changed Circumstances Request. On January 4, 2005, the United States Department of State submitted the "Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the

Congress of the United States of America" to Senator Jeff Bingaman of New Mexico. The report stated that the Changed Circumstances Request did not satisfy the requirements contained in Article IX of the Section 177 Agreement and therefore concluded that no legal basis for additional payments was raised in the Changed Circumstances Request. On July 19, 2005, the House Committee on Resources and the House Committee on International Relations Subcommittee on Asia and the Pacific held a joint hearing regarding the RMI and the Changed Circumstances Request. The court has not been made aware of any action by Congress since that date.

## DISCUSSION

Defendant has moved pursuant to RCFC 12(b)(1) and 12(b)(6) for dismissal of plaintiffs' Amended Complaint for lack of subject matter jurisdiction, or alternatively, for failure to state a claim upon which relief can be granted. The former ground implicates the statute of limitations and withdrawal of jurisdiction from the courts; the latter, the doctrine of res judicata.

I. *Statute of limitations*

Jurisdiction must be established before the court may proceed to the merits of a case. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 88-89 (1998). Any party may challenge, or the court may raise *sua sponte,* subject matter jurisdiction at any point in a proceeding, even upon appeal. *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 506 (2006). If the jurisdictional facts alleged in the complaint are disputed, "the ... court may consider relevant evidence in order to resolve the factual dispute." *Reynolds v. Army and Air Force Exch. Serv.,* 846 F.2d 746, 747 (Fed. Cir. 1988); *Moyer v. United States,* 190 F.3d 1314, 1318 (Fed. Cir. 1999) (holding that "[f]act-finding is proper when considering a motion to dismiss where the jurisdictional facts in the

complaint ... are challenged"); *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993) (permitting review of evidence extrinsic to pleadings, including affidavits and deposition testimony). Once the court's subject matter jurisdiction is put into question, it is "incumbent upon [plaintiff] to come forward with evidence establishing the court's jurisdiction. We agree that [plaintiff] bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Reynolds*, 846 F.2d at 748; *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (holding that, "[i]f [plaintiff's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof").

The statute of limitations set forth in the Tucker Act requires that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (2000). The six-year statute of limitations "set forth in § 2501 [of Title 28] is a jurisdictional requirement." *Bianchi v. United States*, 475 F.3d 1268, 1274 (Fed. Cir. 2007); *John R. Sand & Gravel v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006), *cert. granted*, 127 S.Ct. 2877 (No. 06-1164, 2007 Term) ("The six-year statute of limitations set forth in section 2501 is a jurisdictional requirement for a suit in the Court of Federal Claims."); *Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc) ("It is well established that statutes of limitations for causes of action against the United States, being conditions on the waiver of sovereign immunity, are jurisdictional in nature."). Because it is jurisdictional, the requirement of section 2501 cannot be waived. *John R. Sand & Gravel*, 457 F.3d at 1354 (citing *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)).

Recent decisions of the Federal Circuit have held that claims failing to satisfy section 2501 should be dismissed for failure to state a claim, rather than for lack of subject matter jurisdiction. *See, e.g., Venture Coal Sales Co. v. United States*, 370 F.3d 1102, 1105 n. 2 (Fed. Cir. 2004) ("The most precise ground for the trial court's decision here ... would seem to be that [plaintiff] failed to make its claim within the required limitations period-that is not a question of subject matter jurisdiction of the court."); *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998) ("The Court of Federal Claims has subject matter jurisdiction to adjudicate cases arising under the Tucker Act regardless of the timeliness of [plaintiff's] actions. [Plaintiff's] untimeliness can, however, bar its eligibility to invoke that jurisdiction."). Panels of the Federal Circuit continue to disagree on this issue, as evidenced by Judge Newman's dissent in *John R. Sand & Gravel*, 457 F.3d at 1361, now on review by the Supreme Court. In dissenting from the majority's holding that the statute of limitations contained in section 2501 is jurisdictional, Judge Newman stated:

> [T]he Court of Federal Claims, without dispute, had jurisdiction of the parties and the subject matter.... The text of the statute confirms that the limitations period is applied to claims of which the Court of Federal Claims already "has jurisdiction"....
>
> Contrary to the position of the panel majority, the limitations period is not itself a matter of jurisdiction.

*Id.* at 1361-62 (citations omitted); *see also Martinez*, 333 F.3d at 1320 (Mayer, C.J., Plager, Newman, Gajarsa, Linn, & Dyk, JJ., dissenting). Despite a nascent shift in the more recent appellate decisions, the court follows the binding precedent that a motion to dismiss a

complaint as time-barred by the statute of limitations properly is considered as a motion to dismiss for lack of subject matter jurisdiction, given the en banc decision in *Martinez* and the majority opinion in *John R. Sand & Gravel.*[5]

In response to defendant's argument that plaintiffs' claims are barred by the Tucker Act's six-year statute of limitations, plaintiffs counter that defendant should be estopped from raising the statute of limitations. Alternatively, they contend that the statute of limitations should be equitably tolled because the failure of the "alternative claims procedure to provide adequate compensation for the loss of [plaintiffs'] land[ ] .... was unknowable until after March 5, 2001, the date of the NCT decision." Pls.' Br. filed Dec. 18, 2006, at 36 (citing *Juda II* at 689, and *People of Enewetak,* 864 F.2d at 136, for proposition that alternative procedure could not be challenged until it had run its course).

"A claim accrues when all events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute an action." *Alliance of Descendants of Tex. Land Grants v. United States,* 37 F.3d 1478, 1481 (Fed. Cir. 1994); *see Hopland Band of Pomo Indians,* 855 F.2d at 1577 (stating that cause of action accrues "only when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their

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[5] *Certiorari* was granted by the Supreme Court of the United States on May 29, 2007, "limited to Question 1 presented by the petition," *John R. Sand & Gravel Co. v. United States,* 127 S.Ct. 2877 (2007), which asks "[w]hether the statute of limitations in the Tucker Act limits the subject matter jurisdiction of the Court of Federal Claims." Petition for Writ of Certiorari, *John R. Sand & Gravel,* 127 S.Ct. 2877 (2007) (No. 06-1164).

existence"). A cause of action accrues, when a plaintiff is "armed with the facts about the harm done to him." *United States v. Kubrick*, 444 U.S. 111, 123 (1979). "A claimant under the Fifth Amendment must show that the United States, by some specific action, took a private property interest for a public use without just compensation." *Alliance of Descendants of Tex. Land Grants*, 37 F.3d at 1481.

In Count I of their Amended Complaint, plaintiffs allege that defendant's "failure and refusal to fund adequately the award issued" by the NCT constitutes a Fifth Amendment taking of plaintiffs' claims before the NCT for public use. Am. Compl. ¶ 104. Framed another way, plaintiffs allege that the Government took their claims in violation of their Fifth Amendment right to just compensation because Congress has failed to act on the Changed Circumstances Request. A report to Congress does not constitute a governmental action that could be considered a taking of any interest. A report merely supplies Congress with information that may justify or prompt further action. Congress has made no final determination on plaintiffs' petition, and the apparent lack of action after two years cannot establish a taking until plaintiffs can show that Congress no longer is considering their petition. Therefore, the court finds that no government act has taken place within the last six-years that relates to the asserted taking of plaintiffs' private property interest.

In Count II of their Amended Complaint, plaintiffs allege that "[d]efendant's failure and refusal adequately to fund the award issued by the Nuclear Claims Tribunal on March 5, 2001 constitutes a breach of the fiduciary obligations imposed upon it in 1946 by the creation of a contract implied in fact between defendant and plaintiffs." Am. Compl. ¶ 112. As in Count I, plaintiffs have not alleged any action on the part of the United

States Government occurring within the last six years that could be considered a breach of plaintiffs' claimed implied-in-fact contract with the United States. While Congress has not yet acted on the Changed Circumstances Request, that circumstance does not constitute an action on the part of the Government sufficient to meet the requirements of the statute of limitations.

Counts III and IV of the Amended Complaint allege that the United States breached the implied duties and covenants of their implied-in-fact contract and the implied duties and covenants owed to plaintiffs as third-party beneficiaries by

> (a) failing or refusing to seek from Congress additional funds for the Nuclear Claims Tribunal sufficient to satisfy the March 5, 2001 award; (b) interfering with plaintiffs' efforts to secure additional funds for the Tribunal to satisfy that award; and (c) failing and refusing to fund adequately the award issued by the Nuclear Claims Tribunal on March 5, 2001.

Am. Compl. ¶ 116; Am Compl. ¶ 120 (same). On both counts, plaintiffs do not allege government action within the last six years that meets the requirements of the six-year statute of limitations. If the implied-in-fact contract or duties or covenants under a third-party beneficiary theory were breached, that event would have occurred in 1986 when the Act became effective. Nothing has changed since 1986 when all of the events occurred to fix the alleged liability of the Government.

Although, plaintiffs argue that their "first four causes of action are based on the failure of the alternative claims procedure to provide adequate compensation for the loss of their lands [and that] .... [t]his failure was unknowable until after March 5, 2001, the date of the NCT decision ...," Pls.' Br. filed Dec. 18,

2006, at 36, plaintiffs have not shown that the claims differ substantively from the breach of contract claims in *Juda I* and *Juda II*. The substance of plaintiffs' dispute with the United States has been the same for the last twenty-one years: plaintiffs seek additional compensation for damages caused by the Nuclear Testing Program. The amounts specified in the settlement agreement also were known to plaintiffs in 1986. The terms and conditions of the Changed Circumstances provision were known to plaintiffs in 1986. The court cannot find now-twenty-one years after the Compact was entered into-that plaintiffs' claims are timely.

In Count V plaintiffs allege a takings claim for the use and occupation of Bikini Atoll by the Government based on the passage of the Compact in 1986 and the failure adequately to fund the NCT. In *Juda II* Judge Harkins held open the possibility of future litigation on the adequacy of the alternative remedy provided for in Compact Act:

> Whether the compensation, in the alternative procedures provided by Congress in the Compact Act, is adequate is dependent upon the amount and type of compensation that ultimately is provided through those procedures. Congress has recognized and protected plaintiffs' right to just compensation for takings and for breach of contract. The settlement procedure, as effectuated through the Section 177 Agreement, provides a "reasonable" and "certain" means for obtaining compensation. Whether the settlement provides "adequate" compensation cannot be determined at this time.

*Juda II* at 689. The Federal Circuit endorsed this analysis in *People of Enewetak*, again acknowledging a

possibility of future litigation on plaintiffs' Fifth Amendment takings claims. 864 F.2d at 136 ("[W]e are unpersuaded that judicial intervention is appropriate at this time on the mere speculation that the alternative remedy may prove to be inadequate.").

Plaintiffs maintain that these takings claims are now ripe for litigation because they have exhausted the alternative procedure mandated in the Compact Act. "Having obtained the dismissal of the *Juda* case as premature, the government cannot invoke the statute of limitations now. *Alliance of Texas Land Grants v. United States,* 37 F.3d 1478 (Fed. Cir. 1994) ... is inapposite, because plaintiffs in that case were not told that their claims were premature and to return to court after exhausting an alternative remedy." Pls.' Br. filed Dec. 18, 2006, at 36. The court finds that litigation on this issue is still premature. The alternative procedure in the Compact Act and in Article IX of the Section 177 Agreement included a Changed Circumstances provision, which allocated to Congress the option to "authorize and appropriate funds" in the event that "loss or damage to property and person of the citizens of the Marshall Islands, resulting from the nuclear testing program arises or is discovered after the effective date" of the Compact Act and Changed Circumstances provision.

Congress has not yet exercised its option to "authorize and appropriate funds" for the Marshall Islands. The court is in no position to find that the alternative procedure, as contemplated by the Compact Act, has run its course. Congress must consider the Changed Circumstances Request and take such action as it deems appropriate. That Congress has not acted in the seven years after the Changed Circumstances Request was first submitted would not warrant a finding of either futility or *de facto* rejection, given the court's

alternate ruling on the political question that this matter presents.

Finally, in Count VI plaintiffs allege that the Compact constituted a breach of fiduciary duties created by an implied-in-fact contract. "This cause of action did not first accrue, or the applicable statute of limitations was equitably tolled, until defendant, on January 24, 2005, refused to adequately fund the award issued by the Nuclear Claims Tribunal on March 5, 2001." Am. Compl. ¶ 128. Submission of the Report from the United States State Department to Congress without further action by the Government or Congress is insufficient to trigger the statute of limitations. Plaintiffs have not alleged any Government action within the last six years that would be actionable as a breach of the Government's alleged fiduciary duties.

1. *Equitable estoppel*

Plaintiffs would estop defendant from arguing that the statute of limitations bars their claims. They insist that (1) a dismissal based on the statute of limitations would be an unconstitutional "bait and switch," because the court in *Juda II* dismissed plaintiffs' claims as premature, and (2) the Government cannot invoke the statute of limitations now that the alternative procedure has run its course. Pls.' Br. filed Dec. 18, 2006, at 36.

"Estoppel is an equitable doctrine invoked to avoid injustice in particular cases." *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 59 (1984). To succeed on the grounds of equitable estoppel, generally a plaintiff must show that it "relied on its adversary's conduct 'in such a manner as to change his position for the worse,' and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." *Id.* (footnotes omitted). This general rule, however, is not applicable against the Government: "[I]t

is well settled that the Government may not be estopped on the same terms as any other litigant." *Id.*

> Although the Supreme Court has not adopted a per se rule prohibiting the application of equitable estoppel against the government under any circumstances, ... the Court has suggested that if equitable estoppel is available at all against the government some form of affirmative misconduct must be shown in addition to the traditional requirements of estoppel....While the Supreme Court has not squarely held that affirmative misconduct is a prerequisite for invoking equitable estoppel against the government, this court has done so.

*Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000) (internal citations omitted); *see also Frazer v. United States*, 288 F.3d 1347, 1352-53 (Fed. Cir. 2002); *Tefel v. Reno*, 180 F.3d 1286, 1303 (11th Cir. 1999); *Henry v. United States*, 870 F.2d 634, 637 (Fed. Cir. 1989).

Plaintiffs contend that "the government cannot consistent with due process argue that it is premature to challenge the adequacy of the [NCT's] process and then declare that such a challenge necessarily comes too late." Pls.' Br. filed Dec. 18, 2006, at 36 (citing *Reich v. Collins*, 513 U.S. 106, 108 (1994)).

> Had plaintiffs done what the government now suggests-sue based on the Compact itself and challenge the alternative remedy before the NCT had issued its award-this Court would have found, as did the courts in *Juda II*, 13 Cl. Ct. at 689, and *People of Enewetak*, 864 F.2d at 136, that the alternative procedure could not be challenged until it had run its course. That is precisely what the Supreme Court concluded in [*Dames & Moore v. Regan*, 453 U.S. 654

> (1981)], when it held out the prospect of later adjudication of takings claims in this Court. Having obtained the dismissal of the *Juda* case as premature, the government cannot invoke the statute of limitations now. *Alliance of Texas Land Grants v. United States*, 37 F.3d 1478 (Fed. Cir. 1994) ... is inapposite, because plaintiffs in that case were not told that their claims were premature and to return to court after exhausting an alternative remedy.

Pls.' Br. filed Dec. 18, 2006, at 36.

During oral argument and in their first supplemental brief, plaintiffs argued that defendant misled plaintiffs, and presumably the Federal Circuit, by assuring the Federal Circuit in 1988 during argument in *People of Enewetak* that, " 'should changed circumstances arise which would prevent the program from functioning as planned, Congress would need to consider possible additional funding.' " Pls.' Br. filed May 23, 2007, at 16. "In contrast to its earlier assurances, despite evidence of substantial uncompensated and unforeseen harm, the government told Congress that 'the facts ... do not support a funding request under the 'changed circumstances' provision ...' " *Id.* (quoting 2005 Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America).

Review of the Consolidated Brief of Appellee the United States, *People of Enewetak v. United States*, Nos. 88-1206, -1207 & -1208 (Fed. Cir. June 24, 1988) (the "Appellee Brief"), shows that, while he served as Assistant Attorney General of the Lands and Natural Resources Division of the United States Department of Justice, Roger J. Marzulla advocated on behalf of the United States that plaintiffs might avail themselves of

the Changed Circumstances provision in these circumstances.[6]

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[6] For example, the Government stated in the Appellee Brief: "The Section 177 Agreement, signed in conjunction with the Compact on June 25, 1983, has created a comprehensive, integrated compensation plan 'to provide, in perpetuity, a means to address past, present and future consequences of the nuclear Testing Program' (App.332)." Appellee Brief at 9.

The Government elaborated upon this argument in Section III.A of the Appellee Brief, discussing the limited nature of the Changed Circumstances provision of the Section 177 Agreement:

> The objective of the Agreement is "to create and maintain *in perpetuity*, a means to address past, present and future consequences of the Nuclear Testing Program, including the resolution of resultant claims" (App. 331, emphasis supplied). As the cornerstone funding, the United States on October 30, 1986, immediately after the Compact took effect, paid $150 million to the Marshall Islands government to create the compensation Fund established by Article 1 (App.1241). The Agreement requires, however, that the Fund be permanently invested, with an investment goal of at least $18 million per year (App.332), and with all distributions for compensation programs and claims adjudication to come from the proceeds (App.332). The Fund's principal may be drawn only if proceeds will not meet annual distribution schedules (App.336). The Section 177 Agreement's funding structure is thus designed to operate as long as necessary until all consequences of the nuclear testing program are addressed. The United States and Marshall Islands drafted the Agreement to provide continuous funding to *resolve*, not avoid, those consequences.

*It is, of course, conceivable that the Fund could become depleted because of radical long-term investment difficulties, or substantial unforeseen damages. The Agreement expressly provides as to "Changed Circumstances," however, that (App.341-342):*

> If loss or damage to property and person of the

> citizens of the Marshall Islands, resulting from the Nuclear Testing Program, arises or is discovered after the effective date of this Agreement, *and* such injuries were not and could not reasonably have been identified as of the effective date of this Agreement, and if such injuries render the provisions of this Agreement manifestly inadequate, the Government of the Marshall Islands may request that the Government of the United States provide for such injuries by submitting such a request to the Congress of the United States for its consideration. It is understood that this Article does not commit the Congress of the United States to authorize and appropriate funds.

*In any case, it was the best judgment of the United States and Marshall Islands government that the compensation plan as structured in the Agreement will equitably address all consequences of the nuclear testing program.* The Agreement is designed to operate "in perpetuity," is currently operating effectively to address long-term needs, and fulfills the intent that complex problems stemming from the testing program be resolved on a permanent basis.

Appellee Brief at 34-35 (emphasis added; footnotes omitted). Thus, defendant told the appeals court that long-term investment difficulties might occur to render the Agreement's provisions "manifestly inadequate," but then quotes the language of the provision that requires that changed circumstances had to be unforeseeable. Note 33 of the Appellee Brief appears to assuage concerns regarding the adequacy of funding:

> As appellants note (Br. 44 n. 47), disbursements were made from the Fund during its initial year in light of the recent stock market "correction" affecting all investors. That disbursement in no way impairs, nor do appellants suggest that it impairs, the long-term performance and viability of the Fund. Indeed, prior to the stock market disruption, the Fund was achieving an annual return of 20 percent. The amounts disbursed have since been partially restored, and it is anticipated will be fully restored in the near future. The Fund continues to operate as a long-term investment program, providing "a perpetual means of addressing the special and unique

In its brief filed nineteen years ago, defendant argues that the financial vagaries in the investment program-arguably including mismanagement-could qualify as a separate changed circumstance, apart from loss or damage. That is because the Appellee Brief acknowledges depletion of the Fund due to "long-term investment difficulties, or substantial unforeseen damages." Appellee Brief at 34; *see* note 6 *supra*. Nonetheless, the shift in defendant's position does not merit its proscription as affirmative misconduct.

The argument in the Appellee Brief certainly includes statements that could be construed as assurances of the availability of future funding should the $150 million trust fund not prove sufficient. Yet, defendant did not misrepresent the Compact or the Section 177 Agreement. References to a "permanent alternative remedy," *see* Appellee Brief at 14, are accompanied by citations, either general or specific, to the language of the Section 177 Agreement. The

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circumstances" arising from the nuclear testing program. (App.332).

*Id.* at 34 n. 33.

Among the "changed circumstances" identified by counsel for plaintiffs in *People of Bikini*, No. 06-288C, was the ambitious, if not unrealistic, assumption that the Trust Fund had to generate a return of 12% per year to finance the $18 million earmarked for the various programs and specific financial commitments for each listed in the Compact, only one of which was the NCT. Counsel reasonably speculated that "[i]t was pretty hard when you've got to throw off 12 percent a year to make that corpus grow." Transcript of Proceedings at 146, *People of Bikini v. United States*, No. 06-288C, and *John v. United States*, No. 06-289L (Fed. Cl. Apr. 23, 2007).

language of the Changed Circumstances provision of Section 177 is not a blanket guarantee of future funding for the people of the Marshall Islands. The Changed Circumstances provision provides relief conditioned upon 1) the discovery of loss or damage to property after the effective date of the Agreement, 2) an unforeseeable qualifying event and 3) approval of Congress. While defendant did not misrepresent the terms of the Compact, the Federal Circuit was persuaded by defendant's argument and arguably overstated the breadth of the Changed Circumstances provision. *See People of Enewetak*, 864 F.2d at 135-36.

In any event, this rationale was not the predicate for the appeals court's affirmance of the Claims Court. Even if defendant was not forthcoming in its argument, invocation of equitable estoppel is not warranted. The Compact, in plain language, required a dual showing, not an alternative one; defendant quoted the Compact accurately; defendant argued that the Trust Fund was structured to be renewable in perpetuity. Plaintiffs were well aware of the terms of the Changed Circumstances provision and had ample opportunity to argue to the Federal Circuit that the clause did not allow recourse to the courts should the Claims Tribunal render an award that could not be funded.[7]

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[7] Implicit in plaintiffs' reliance on defendant's advocacy is their objection that the RMI did not represent the inhabitants of the Marshall Islands, because the RMI had no power or right to accede to the Compact until the RMI became a recognized governmental entity. Judge Harkins in *Juda II* ruled that the validity of the espousal in Article X did not impact the withdrawal of claims effected by Article XII. *See Juda II* at 686-89; *see also People of Enewetak*, 864 F.2d at 137 (adopting Judge Harkins's "more extensive analysis.").

2. *Equitable tolling*

Plaintiffs' alternative position, that the statute of limitations is subject to equitable tolling, also cannot succeed, as plaintiffs do not meet the requirements of the doctrine with respect to Counts I-IV and VI. *Irwin v. Department of Veteran Affairs*, 498 U.S. 89 (1990), established the current law involving the doctrine of equitable tolling against the Government:

> A waiver of sovereign immunity " 'cannot be implied but must be unequivocally expressed.' " *United States v. Mitchell*, 445 U.S. 535, 538(1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver....
>
> ... Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

*Id.* at 95-96 (footnotes omitted); *Scarborough v. Principi*, 541 U.S. 401, 420-21 (2004) (discussing Court's rejection of " 'unduly restrictive' construction of the statute of limitations under the Tucker Act" in *Franconia Associates v. United States*, 536 U.S. 129 (2002)); *Mapu v. Nicholson*, 397 F.3d 1375, 1379-80

(Fed. Cir. 2005) (denying equitable tolling of period for appeal).

Equitable tolling would be inappropriate in this case because plaintiffs neither filed a defective pleading during the statutory period, nor has the Government either induced or tricked plaintiffs into allowing the filing deadline to pass. In fact, the situation is quite the opposite. Plaintiffs had a suit pending in the Claims Court when the Compact was entered into in 1986. *See Juda I* at 445. In *Juda II* plaintiffs had full opportunity to litigate the issue of subject matter jurisdiction in the Claims Court. *Juda II* at 689. Ultimately, the court ruled that jurisdiction had been withdrawn, but left open the question of whether the "settlement provides 'adequate' compensation" until the "amount and type of compensation that ultimately is provided" has been determined. *Id.* at 689. On appeal plaintiffs in *Juda II* agreed to a dismissal with prejudice based upon the appropriation of an additional $90,000,000 over a five-year period for the purpose of funding the Resettlement Trust Fund for the People of Bikini. *People of Bikini*, 859 F.2d at 1482. Apart from their takings claim, the record does not disclose a finding that the earlier pleadings were somehow defective, such that the court now can consider equitable tolling as to Counts I-IV and VI.

The essence of plaintiffs' argument concerning the statute of limitations is that the court in *Juda II* ruled that the issue of whether the NCT's process would provide just compensation to plaintiffs was premature. Judge Harkins stated:

> This court, plaintiffs say, cannot uphold the constitutionality of Article XII without first making a determination that the settlement procedure, and Claims Tribunal established under the Section 177 Agreement, satisfy these

constitutional requirements.

> These assertions are premature. Whether the compensation, the alternative procedure provided by Congress in the Compact Act is adequate is dependent upon the amount and type of compensation that ultimately is provided through those procedures. Congress has recognized and protected plaintiffs' rights to just compensation for takings and for breach of contract. The settlement procedure, as effectuated through the Section 177 Agreement, provides a "reasonable" and "certain" means for obtaining compensation. Whether the settlement provides "adequate" compensation cannot be determined at this time.

*Juda II* at 689. The only claim that was held open for potential review in *Juda II* was plaintiffs' claim for a taking compensable under the Fifth Amendment of the Constitution. Regarding plaintiffs' other claims, which alleged breach of implied-in-fact contracts within the jurisdiction of the Tucker Act, the court concluded that Congress intended to withdraw its consent to sue. *Juda II* at 689. It is a mischaracterization of the holding in *Juda II* to argue that all of the claims originally pleaded can be revived.

II. *Failure to state a claim*

Defendant argues that Counts I, II, II, IV, and VI of plaintiffs' Amended Complaint would be subject to dismissal under RCFC 12(b)(6) for failure to state a claim upon which relief can be granted.

Count I pleads a taking. The standard for determining whether a Fifth Amendment taking has occurred, as articulated in *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363 (Fed. Cir. 2004), follows:

> First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment. *Maritrans* 342 F.3d at 1351. "It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." *Wyatt*, 271 F.3d at 1096 (citing, *inter alia*, *Almota Farmers Elevator Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973); *Cavin v. United States*, 956 F.2d 1131, 1134 (Fed. Cir. 1992))....
>
> Second, after having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest. *Chancellor Manor v. United States*, 331 F.3d 891, 902 (Fed. Cir. 2003) (citing [ *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995)]).

*Id.* at 1372.

Defendant charges that plaintiffs have not alleged the "occurrence of any Federal Government act since 1986 that has deprived them of any property interest." Def.'s Br. filed Sept. 15, 2006, at 33. Indeed, no acts on the part of the Government are alleged that could entitle plaintiffs to additional funds. The Compact and the Trust Fund established pursuant to settlement of plaintiffs' claims did not guarantee plaintiffs additional funding. See Changed Circumstances provision. Moreover, plaintiffs have alleged no affirmative government act that deprives them of any property interest in additional funding from the United States. *See D.R. Smalley & Sons, Inc. v. United States*, 372 F.2d 505, 508 (1967) ("All of the acts and omissions complained of by plaintiffs were those of the State of Ohio. It does not allege a single affirmative act on the

part of defendant that deprived it of any of its property nor that interfered with or disturbed its property rights in any way. Without such allegation, plaintiff cannot recover damages from defendant on this theory.").

For similar reasons plaintiffs cannot establish the existence of an implied-in-fact contract for additional funds. In Counts II, III, IV, and VI, plaintiffs allege breaches of implied-in-fact contracts based the acts of the Government beginning in 1946 when the Government relocated the People of Bikini. Any implied-in-fact contract that may have existed between the United States and the People of Bikini, as will be discussed, was terminated in 1986 by the Compact. Plaintiffs attempt to distinguish their new claims by arguing that defendant "ignores the new causes of action in plaintiffs' Amended Complaint, in which the people of Bikini contend that the Compact and the Section 177 Agreement themselves constitute a breach of an implied-in-fact contract," Pls.' Br. filed Dec. 18, 2006, at 39, which devolves to the tautology that something new must have occurred.

In order to maintain a claim based on an implied-in-fact contract, a plaintiff must show: "(1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance; and (4) *actual authority on the part of the government's representative to bind the government.*" *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1265 (Fed. Cir. 2005). Any implied-in-fact contract pleaded in Count IV that may have existed before the Compact became effective was terminated by Section 127 of the Compact Act, which provides:

> Except as otherwise provided in this Compact or its related agreements, all obligations, responsibilities, rights and benefits of the Government of the United States as

> Administering Authority which have resulted from the application pursuant to the Trusteeship Agreement of any treaty or other international agreement to the Trust Territory of the Pacific Islands on the day preceding the effective date of this Compact are no longer assumed and enjoyed by the Government of the United States.

Because the Section 177 Agreement "constitute[d] the full settlement of all claims, past present and future," a mutual intent to contract beyond the terms of the Compact and the Section 177 Agreement has not been pleaded that could avoid this all-encompassing language. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965-66 (2007); *Alliance of Descendants of Tex. Land Grants*, 37 F.3d at 1483.

Plaintiffs' contention that the Compact itself constituted a breach of an implied-in-fact contract cannot withstand judicial scrutiny. "The overall purpose of the Compact Act must not be lost sight of. The thrust of the Compact Act is to discharge United States obligations to promote the development of the Marshall Island peoples toward self-government." *Juda II* at 683. As will be addressed in more detail, the United States validly withdrew its consent to be sued in the courts of the United States. *See* Section 177 Agreement, art. X § 1. Therefore, plaintiffs cannot be allowed to continue to pursue their implied-in-fact contract claims in Counts II, III, IV, and VI.

III. *Res judicata*

The task of a federal court when reviewing the sufficiency of the complaint for failure to state a claim "is necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.*

When a complaint properly is within its jurisdiction, a court is to accept as true the facts alleged in the complaint, *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999), and to entertain all reasonable inferences in favor of the non-movant, *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). In *Twombly* the Supreme Court circumscribed the rule set in *Conley v. Gibson*, 355 U.S. 41, 45-46, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly* rejected a literal application of the language of *Conley*, stating that "the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible." 127 S. Ct. at 1973 n. 14.

*Juda II* dismissed the claims of plaintiffs because jurisdiction had been withdrawn and remitted them to an alternative remedy. In its motion to dismiss, defendant insists that res judicata extinguishes " 'all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.' " Def.'s Br. filed Sept. 15, 2006, at 16 (quoting *Young Eng'rs Inc. v. United States Int'l Trade Comm'n*, 721 F.2d 1305, 1314 (Fed. Cir. 1983)). Plaintiffs counter with a "distinction between jurisdictional dismissals and dismissals on the merits," arguing that "[j]urisdictional dismissals are not claim preclusive." Pls.' Br. filed Dec. 18, 2006, at 31 (citing *Doe v. United States*, 463 F.3d 1314 (Fed. Cir. 2006); *Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 640 (Fed. Cir. 1989); and *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 687 n. 10 (Fed. Cir. 1992)).

In *Nevada v. United States*, 463 U.S. 110 (1983), the Supreme Court stated:

> Simply put, the doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, "[it] is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). *See Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375, 378 (1940).

*Id.* at 129-30; *see also Epic Metals Corp. v. H.H. Robertson Co.*, 870 F.2d 1574, 1576 (Fed. Cir. 1989). "[B]ecause res judicata can also be used in the sense of any preclusion of litigation arising from a judgment, including collateral estoppel, when discussing the different concepts, courts, including the Ninth Circuit and [the Federal] Circuit, for clarity have substituted the terms 'claim preclusion' and 'issue preclusion.' " *Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 478 (Fed. Cir. 1991). The Federal Circuit has defined claim preclusion: "[W]hen a judgment is rendered in favor of a party to litigation, the plaintiff may not thereafter maintain another action on the same 'claim,' and defenses that were raised or *could have been* raised by the defendant in that action are extinguished." *Id.* at 478. Whether a claim is barred by the doctrine of claim preclusion is an issue of law for the court to determine based upon the facts of the case. *Faust v. United States*, 101 F.3d 675, 677 (Fed. Cir. 1996).

> The doctrine of *res judicata*, in its claim preclusion form, provides that final judgment on a claim extinguishes " 'all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.' " *Young Eng'rs, Inc. v. United States Int'l Trade Comm'n*, 721 F.2d 1305, 1314 (Fed. Cir. 1983) (quoting Restatement (Second) of Judgments § 24 (1982)).

*Hornback v. United States*, 405 F.3d 999, 1001 (Fed. Cir. 2005); *see Container Transport Int'l, Inc. v. United States*, 468 F.2d 926, 928-29 (Ct. Cl. 1972).

Issue preclusion, or collateral estoppel, "bars litigation of an issue if an identical issue was actually litigated and necessarily decided in a prior case where the interests of the party to be precluded were fully represented." *Simmons v. Small Business Admin.*, 475 F.3d 1372, 1374 (Fed. Cir. 2007). "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Issue preclusion "cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Id.* at 95 (citing *Montana v. United States*, 440 U.S. 147, 153 (1979), and *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328-29 (1971)).

Plaintiffs emphasize two Federal Circuit cases, *Do-Well*, 870 F.2d at 640, and *Spruill*, 978 F.2d at 687 n. 10, for the proposition that the doctrine of res judicata does not bar their claims because *Juda II* is not a decision on the merits. In *Do-Well* the Federal Circuit noted in *dicta* that a "dismissal on the merits carries *res*

*judicata* effect and dismissal for want of jurisdiction does not." *Id.* at 640 (citing *Vink v. Hendrikus Johannes Schijf, Rolkan N.V.*, 839 F.2d 676, 677 (Fed. Cir. 1988)). Likewise, in *Spruill*, the Federal Circuit stated in *dicta*, "While the practical result of a dismissal for want of jurisdiction may in some cases be the same as a dismissal for failure to state a claim, the legal consequences can be substantially different. The application of the principle of *res judicata* is just one example." 978 F.2d 679, 687 n. 10.

Based on the following analysis,[8] the court concludes that the applicable bar is collateral estoppel, that the bar has been recognized to apply to dismissals for want of subject matter jurisdiction, and that it should be applied in this case.

It is well established that a dismissal for lack of jurisdiction does not constitute a final judgment on the merits and therefore has no res judicata effect. *See Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1369-70 (Fed. Cir. 2003) (holding that res judicata does not apply to dismissals based on lack of standing: "Because standing is jurisdictional, lack of standing precludes a ruling on the merits.")[9]; *Schafer v.*

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[8] The analysis is taken almost verbatim from this court's decision in *Saladino v. United States*, 62 Fed. Cl. 782, 790-91 (2004).

[9] Although the Federal Circuit applied the law of the Ninth Circuit, this statement was set forth as a general proposition derived from Supreme Court precedent. *See Media Techs. Licensing*, 334 F.3d at 1369-70 (citing *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996)). Under the Federal Circuit's formulation of res judicata, *see Mother's Rest. v. Mama's Pizza, Inc.*, 723 F.2d 1566 (Fed. Cir. 1983), the result would be the same.

*Dep't of Interior*, 88 F.3d 981, 990 (Fed. Cir. 1996) ("This is a decision on the merits which, unlike dismissal for want of jurisdiction, has a res judicata effect."); *Vink*, 839 F.2d at 677 ("A dismissal for lack of subject matter jurisdiction ... is not a disposition on the merits and thus permits a litigant to refile in an appropriate forum."). The only possible bar that could be elicited from *Peter I*, *Peter II*, and *People of Enewetak* would arise from collateral estoppel. The question, then, becomes whether a plaintiff is collaterally estopped from litigating the question of subject matter jurisdiction and/or standing based on materially indistinguishable allegations in a complaint that a court in a prior action had ruled to be insufficient to establish jurisdiction.

The Federal Circuit addressed this issue under slightly different circumstances. In *Ammex, Inc. v. United States*, 384 F.3d 1368, 1371-72 (Fed. Cir. 2004), the Federal Circuit ruled that a sister circuit's determination of a party's standing to pursue a tax refund claim for an amount that the party paid to its suppliers and not to the Federal Government collaterally estopped the taxpayer from pursuing the same claim for different tax years in the Court of Federal Claims. While *Ammex* can be read to give preclusive effect to threshold determinations such as standing, it should be noted that *Ammex* recognized that an appeals court determination provided the preclusive effect. *See id.*

Even if *Ammex* does not stand for the broad proposition, ample authority supports such a result. The Restatement (Second) of Judgments, which the Federal Circuit endorses in this context, *Foster v. Hallco Manufacturing Co.*, 947 F.2d 469, 477 n. 7 (Fed. Cir. 1991), explicitly adopts the rules of issue preclusion to dismissals for lack of jurisdiction despite their lack of

claim-preclusive effects. *See* Restatement (Second) of Judgments § 20, comment b (1982); *id.* § 12, comment c ("When the question of the tribunal's jurisdiction is raised in the original action, in a modern procedural regime there is no reason why the determination of the issue should not thereafter be conclusive under the usual rules of issue preclusion.").

The Federal Circuit has issued rulings consistent with this result. *See, e.g., Dana v. E.S. Originals, Inc.*, 342 F.3d 1320, 1323 (Fed. Cir. 2003) (applying Eleventh Circuit law and quoting the Restatement (Second) of Judgments § 13, which states that, "for purposes of issue preclusion ... final judgment includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect"). In *International Air Response v. United States*, 302 F.3d 1363 (Fed. Cir. 2002), the Federal Circuit quoted broad language from a Supreme Court case stating that "the 'principles of res judicata also apply to jurisdictional determinations-both subject matter and personal.' " 302 F.3d at 1368 (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9 (1982)). However, the Federal Circuit applied this language narrowly to rule that the Government could not collaterally attack the issuance of a stay-a judgment on the merits-by now arguing that the prior court lacked jurisdiction to provide the requested relief. *Id.* at 1369 (foreclosing Government from arguing that claim not timely because district court had issued stay under All Writs Act, thereby tolling one-year statute of limitations).[10] The

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[10] *But see Christopher Vill., L.P. v. United States*, 360 F.3d 1319, 1330-33 (Fed. Cir. 2004) (refusing to grant preclusive effect to sister circuit's judgment that issued without jurisdiction by excepting from bar judgments that, if allowed to stand, would

language taken from the Supreme Court, moreover, appeared in the context of a discussion on collateral attacks: "A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not ... reopen that question in a collateral attack upon on adverse judgment." *See Ins. Corp. of Ireland*, 456 U.S. at 702 n. 9.

Even without this case law, this court would not be ruling in a legal environment devoid of guidance, as many federal courts preclude parties from relitigating the issue of subject matter jurisdiction or other threshold matters even though the prior dismissal did not adjudicate the merits of the case. *See, e.g., Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1209-12 (10th Cir. 2001) (prohibiting relitigation of personal jurisdiction); *Cortes v. Intermedics, Inc.*, 229 F.3d 12, 14-15 (1st Cir. 2000) (same for jurisdiction on basis of federal preemption); *DiGiore v. Ryan*, 172 F.3d 454, 466 (7th Cir. 1999) (justiciability issues), *overruled on other grounds by Whetsel v. Network Prop. Servs., LLC*, 246 F.3d 897 (7th Cir. 2001); *N. Ga. Elec. Membership Corp. v. City of Calhoun*, 989 F.2d 429, 433 (11th Cir. 1993) (subject matter jurisdiction); *Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir. 1980) (jurisdiction); *cf. Okoro v. Bohman*, 164 F.3d 1059, 1062-64 (7th Cir.1999) (allowing party to avoid bar of collateral estoppel from dismissal of prior action ruled frivolous because bar applied only to the precise ground of dismissal). Standing, a threshold matter like jurisdiction, is also entitled to issue-preclusive effect. *See, e.g., Cutler v. Hayes*, 818 F.2d

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"substantially infringe the authority of another tribunal" (quoting Restatement (Second) of Judgments, § 12(2))).

879, 888-89 (D.C. Cir. 1987); *Planned Parenthood Ass'n v. Kempiners*, 700 F.2d 1115, 1138 (7th Cir. 1983) (Posner, J., concurring); *McCarney v. Ford Motor Co.*, 657 F.2d 230, 233 (8th Cir. 1981); *Mrazek v. Suffolk County Bd. of Elections.*, 630 F.2d 890, 896 n. 10 (2d Cir. 1980).

In accord with these authorities, this court applies collateral estoppel to "the precise issue of jurisdiction that led to the initial dismissal." *GAF Corp. v. United States*, 818 F.2d 901, 912 (D.C. Cir. 1987).

Wright, Miller & Cooper have contributed a succinct justification for this result apropos of plaintiffs' claims for a taking of property that were resolved previously:

> [C]ourts have found it convenient to identify the judgments that warrant preclusive effect as "final" or as "on the merits." Little harm is done by such phrases in themselves, but they may obscure the fundamental proposition that different requirements are appropriate to different preclusive effects. Dismissal of a suit for want of federal subject-matter jurisdiction, for example, should not bar an action on the same claim in a court that does have subject matter jurisdiction, but *ordinarily should preclude relitigation of the same issue of subject-matter jurisdiction in a second federal suit on the same claim.*

18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure Jurisdiction (Second) § 4402 (2007) (emphasis added). Thus, while plaintiffs are correct that the dismissal in *Juda II* for want of subject matter jurisdiction would not bar their claims filed in federal district court, the rule does not allow plaintiffs to renew suit in the Court of Federal Claims in order to relitigate the issue of subject matter

jurisdiction with respect to reframed claims from the original *Peter* case.

Judge Harkins held in *Juda II:*

> In *Lynch,* the Supreme Court recognized the sweep of Congressional power to withdraw the consent of the United States to be sued. That consent can be withdrawn at any time. Congressional power to provide, or withdraw, remedies against the United States is virtually without a limit. The Sovereign's immunity from suit exists whatever the character of the proceeding, or the source of the right to be enforced. It applies alike to causes of action arising under acts of Congress and to those arising from some violation of rights conferred upon the citizens by the Constitution. Withdrawal of consent to sue on plaintiffs' claims does not imply repudiation. As long as the obligations are recognized, Congress may direct fulfillment without the interposition of either a court or an administrative tribunal. *Lynch v. United States,* 292 U.S. [571, 582 (1934)].

13 Cl. Ct. at 688-89. From this analytical premise, Judge Harkins concluded:

> Article XII of the Section 177 Agreement by necessary implication amends the Tucker Act. The consent of the United States to be sued in the Claims Court on plaintiffs' taking claims and breach of contract claims that arise from the United States' nuclear testing program in the Marshall Islands has been withdrawn.

*Juda II* at 690. In *People of Enewetak,* the Federal Circuit affirmed the holding in *Peter II* and *Nitol II,* and "adopt[ed the Claims Court's] more extensive analysis in *Juda v. United States,* 13 Cl. Ct. 667 (1987), relating to

the issues discussed above." 864 F.2d at 137.

The above rulings preclude relitigation of subject matter jurisdiction regarding claims that were dismissed on the same grounds in prior litigation. Nevertheless, plaintiffs maintain that dismissal of their claims "is inconsistent .... with the government's position ... in the prior litigation in *Juda*, and with the earlier holdings in *Juda II* and *People of Enewetak* " that such claims were premature. Pls.' Br. filed Dec. 18, 2006, at 7. Plaintiffs rely on the Federal Circuit's endorsement of the language in *Juda II* that "[w]hether the settlement provides 'adequate' compensation cannot be determined at this time." *Juda II* at 686; *see People of Enewetak*, 864 F.2d at 137. Defendant responds that "the Federal Circuit found plaintiffs' argument to be premature at that time does not mean that it held-or even considered-that this Court retained jurisdiction to entertain the issue later." Def.'s Br. filed May 23, 2007, at 2.

Counts II, IV, and VI were brought, or could have been brought, in the Claims Court when plaintiffs filed their original suit. In *Juda II* the court dismissed plaintiffs' breach of implied-in-fact contract claims, ruling that Congress had withdrawn its consent to respond to claims in the Claims Court. "It is clear that Congress through Article XII intended to withdraw the consent to suit by plaintiffs on the claims in these cases. An unbroken line of decisions holds that Congress may withdraw its consent to sue the Government at any time." *Juda II* at 689-90 (citations omitted). Plaintiffs cannot re-frame those issues to retest subject matter jurisdiction at this late date.

This conclusion does not embrace plaintiffs' takings claims-Count I of the Amended Complaint for a taking of plaintiffs' claims before the NCT and Count V for the underlying taking of plaintiffs' land. Defendant is not

persuasive that the statements of the Federal Circuit and Claims Court were of no import. If the doctrine of res judicata forecloses consideration of Counts I and V, based upon the withdrawal of jurisdiction in the Compact Act and the Section 177 Agreement, the statements by both the Federal Circuit and the Claims Court are rendered superfluous. It would not be prudent to infer that either court commented without reason upon the prematurity of plaintiffs' claims for just compensation. The language of the *People of Enewetak* and *Juda II* opinions supports the conclusion that the Federal Circuit, as well as the Claims Court, contemplated that plaintiffs might return to court in order to raise a claim regarding the adequacy of the compensation awarded by the Claims Tribunal and/or enforcement of that award. Thus, plaintiffs' claims for review of the adequacy of relief under the Compact Act and the Section 177 Agreement-Counts I and V-are not subject to dismissal under the doctrine of res judicata, as *People of Enewetak* and *Juda II* confirm that no final resolution was made, or judgment entered, in respect of plaintiffs' challenge to the adequacy of the alternative relief.

IV. *Withdrawal of jurisdiction*

Defendant argues that the withdrawal of jurisdiction contained in Article XII of the Section 177 Agreement requires dismissal of plaintiffs' claims. The scope of the withdrawal of jurisdiction is "determined primarily by Compact Act §§ 103(g)(1) and (2), Compact § 177 and § 471(c), and the Section 177 Agreement, Article X, § 1 and Article XII." *Juda II* at 683. As the D.C. Circuit noted in *Antolok:*

> It is axiomatic in our federal jurisprudence that inferior courts ... have only that jurisdiction afforded them by Congress.... In 1850, a unanimous Supreme Court held that

> [t]he Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the [inferior] Court[s]; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

873 F.2d at 373-74 (quoting *Sheldon v. Sill*, 49 U.S. 441, 449 (1850)).

It is "well settled ... [t]hat the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts." *United States v. Babcock*, 250 U.S. 328, 331 (1919) (citations omitted). "[A]lthough a vested cause of action is property and is protected from arbitrary interference, ... no property, in the constitutional sense, [exists] in any particular form of remedy; all that ... is guaranteed by the Fourteenth Amendment is the preservation of [a] substantial right to redress by some effective procedure." *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933) (citations omitted).

The Supreme Court reviewed the breadth of jurisdiction granted to the Court of Claims in *Schillinger v. United States*, 155 U.S. 163. "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination." *Id.* at 166. Based upon the doctrine of sovereign immunity, the Court reasoned:

> It is said that the Constitution forbids the taking of private property for public uses without just compensation; that, therefore, every

> appropriation of private property by any official to the uses of the government, no matter however wrongfully made, creates a claim founded upon the Constitution of the United States, and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress. This prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the government, should expose it to an action for damages in the court of claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided.

*Id.* at 168. This view was supported in *Lynch*, where the Supreme Court stated that " 'contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.' The rule that the United States may not be sued without its consent is all-embracing." 292 U.S. at 580-81 (quoting The Federalist No. 81 (Alexander Hamilton)).

1. *Withdrawal of jurisdiction in Article X of the Section 177 Agreement*

The withdrawal of jurisdiction regarding claims that arise from the Nuclear Testing Program is an

unambiguous express provision of the Section 177 Agreement. Article X, Section 1 of the Section 177 Agreement, quoted again for context, recites:

> This Agreement constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, its agents, employees, contractors and citizens and nationals, and of all claims for equitable or any other relief in connection with such claims including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions.

Article XII of the Section 177 Agreement provides:

> All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed.

2. *Implied-in-fact contract claims and claims based on breach of fiduciary duty*

Plaintiffs allege a breach of implied-in-fact contract and breach of fiduciary duties in Counts II, III, IV, and VI, claims that are based upon the conduct of the United States in its treatment and care of the people of the RMI during the Nuclear Testing Program and other subsequent uses of Bikini Atoll. In order to come within the jurisdiction of the Court of Federal Claims, the scope of claims covered by the withdrawal of jurisdiction

contained in Article XII of the Section 177 Agreement must not reach these claims.

Counts II, III, IV, and VI all relate to the Nuclear Testing Program. The implied-in-fact contract that is the basis of plaintiffs' allegations in Counts II and III was created, according to plaintiffs, "when defendant moved the people of Bikini off their atoll on March 7, 1946," in preparation for the first American nuclear bomb testing. Am. Compl. ¶ 107. In Count II plaintiffs allege that the Government breached the implied-in-fact contract by "failing or refusing to seek from Congress additional funds for the Nuclear Claims Tribunal." Am. Compl. ¶ 116. The NCT was designated as an alternative tribunal to settle finally plaintiffs' claims. Jurisdiction over any claims related to the NCT was withdrawn by the Section 177 Agreement per Articles X and XII. Any claim for additional funding is, at its core, a claim relating to the Nuclear Testing Program and, therefore, cannot be brought in the Court of Federal Claims.

Likewise, in Count IV, plaintiffs allege that the Government breached the implied duties and covenants due plaintiffs as "intended direct third-party beneficiaries of the Compact agreements signed between the defendant and the RMI Government." Am. Compl. ¶ 119. In Count VI plaintiffs allege a breach of the fiduciary obligations imposed on the Government in 1946 through the formation of the Compact. Am. Compl. ¶¶ 126-29. Although the language of plaintiffs' counts carries different connotations, the heart of their dispute with the Government-whether framed as a breach of implied duties or breach of fiduciary duties-relates directly to the Nuclear Testing Program. For example, in Count VI, plaintiffs allege that their cause of action did not accrue until January 24, 2005, when the United States "refused to adequately fund the award issued by the Nuclear Claims Tribunal on March 5,

2001." Am. Compl. ¶ 128. The NCT determined on March 5, 2001, the amount of award to plaintiffs based on the damages caused by the Nuclear Testing Program. Plaintiffs attempt to mask the essence of their claim by attacking the Compact.

By Counts I-IV and VI, plaintiffs seek $561,036,320, the amount of the NCT's original award, less the two payments that have been made to the People of Bikini. *See* Am. Compl. ¶¶ 105-129. Withdrawal of jurisdiction for a claim based on an implied-in-fact contract or breach of fiduciary duties against the United States, particularly in circumstances that implicate foreign relations, falls squarely within the power of Congress. *See Lynch*, 292 U.S. at 581 ("The rule that the United States may not be sued without its consent is all-embracing.").

Consistent with defendant's argument that all of plaintiffs' claims have been withdrawn, the court notes that the Government attempted to settle fully the claims of the People of Bikini following the litigation before Judge Harkins. *See* Pub. L. No. 100-446, 102 Stat. 1774, 1798 (1988). The settlement in *Bikini* was signed into law on September 27, 1988, and provided, in order to "ful[ly] satis[fy] the obligation of the United States to provide funds to assist in the resettlement and rehabilitation of Bikini Atoll by the People of Bikini, to which the full faith and credit of the United States is pledged pursuant to section 103(*l* ) of Public Law 99-239, [that] the United States shall deposit $90,000,000 into the Resettlement Trust Fund for the People of Bikini established pursuant to Public Law 97-257." *Id.* The plain language of this act underscores the finality effected by the withdrawal of jurisdiction. The Federal Circuit in *People of Enewetak* recited the circumstances of dismissal of plaintiffs' appeal in *Juda II:*

> The claimants in *Juda* also appealed. That

> appeal was dismissed with prejudice upon the unopposed motion of claimants, following the enactment of special legislation which appropriated funds for the benefit of the People of Bikini. *People of Bikini, Enewetak, Rongelap, Utrik & Other Marshall Islands Atolls v. United States*, 859 F.2d 1482 (Fed. Cir. 1988).

*People of Enewetak*, 864 F.2d at 135 n. 1.

3. *Fifth Amendment claims*

Plaintiffs assert two claims that are based upon their Fifth Amendment right to just compensation for private property taken for public use. Count I alleges a Fifth Amendment taking of plaintiffs' claims before the NCT for public use based on the Government's "failure and refusal to fund adequately the award issued by the Nuclear Claims Tribunal on March 5, 2001." Am. Compl. ¶ 104. Count V alleges a takings claim for the use and occupation of Bikini Atoll by the Government based on the passage of the Compact in 1986 and the failure adequately to fund the NCT. *See* Am. Compl. ¶¶ 122-25.

As the court has concluded that Counts I and V fall outside of the Tucker Act's six-year statute of limitations, consideration of these claims is foreclosed. However, as the Claims Court and the Federal Circuit indicated that review of the adequacy of relief provided was not ripe in *Juda II* and *People of Enewetak*, the court addresses an alternative ground for dismissal should it be determined that Counts I and V satisfy the applicable statute of limitations.

1) *Taking of implied-in-fact contract claim*

As support for their claim for just compensation based upon the implied-in-fact contract created by the conduct of the United States following its occupation of the RMI in 1944, plaintiffs rely on the Supreme Court's holding in *Lynch:*

> Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. When the *United* States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.

292 U.S. at 579 (internal citations omitted).

Because plaintiffs' constitutional claims, by their terms, are included in "all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program," Section 177 Agreement, art. X, § 1, defendant places plaintiffs' constitutional claims within the scope of the withdrawal of jurisdiction effected by Article XII of the Section 177 Agreement. Plaintiffs counter that, even if their claims are related to the Nuclear Testing Program, they constitute a property right that mandates the payment of just compensation under the Fifth Amendment and that their constitutional claims cannot be withdrawn from judicial review. Acknowledging that Congress may provide for an alternative forum for compensation, plaintiffs maintain that a Tucker Act claim challenging the constitutionality of the alternative relief has been preserved as a final resort for a Fifth Amendment claim for just compensation.

Defendant offers the binding precedent of the Court of Claims in *Gold Bondholders Protective Council, Inc. v. United States,* 676 F.2d 643 (Ct. Cl. 1982), in which plaintiff argued for Fifth Amendment compensation based upon the United States' failure to redeem a bond in gold. The court viewed *Lynch* as rejecting this proposition. "[T]he Supreme Court ruled directly to the

contrary in its landmark decision in *Lynch v. United States*," *Gold Bondholders*, 676 F.2d at 647, and cited to *Lynch* for the proposition that

> [a]lthough consent to sue was thus given when the policy issued, Congress retained power to withdraw the consent at any time. For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration.

*Id.* (citing *Lynch*, 292 U.S. at 581). Based on this precedent, the court concludes that Count IV is subject to dismissal, as Congress validly withdrew jurisdiction from the court under the Section 177 Agreement.

2) *Taking of plaintiffs' takings claim*

Plaintiffs also have alleged an uncompensated taking of their right to just compensation under the Fifth Amendment in Count V, a claim based upon a constitutional right, not a contract. This claim is thus distinguishable from *Lynch* and *Gold Bondholders*, and plaintiffs cite to case law in support of the proposition that the Court of Federal Claims must retain jurisdiction to review the adequacy of the alternative relief in the Section 177 Agreement.

The doctrine of constitutional avoidance is a rule of statutory construction that requires the court to "avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the [Supreme] Court in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), and has for so long been applied by this Court that it is beyond debate." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades*, 485 U.S. 568, 575 (1988) (citations omitted). Plaintiffs' takings claim for

the taking of Bikini Atoll following its occupation, Count I of plaintiffs' complaint, must be dismissed based upon the statute of limitations. Because plaintiffs' claim for the taking of Bikini Atoll cannot proceed, the constitutionality of foreclosing plaintiffs' legal suit is not reviewable. In other words, plaintiffs do not have a takings claim, so no taking of a non-existent takings claim could be actionable. Even if it could, the court declines to address "the difficult question of whether inferior courts may be barred by an act of Congress from review of constitutional challenges to statutes." *Antolok*, 873 F.2d at 378.

V. *Political question*

While discussion of the political question doctrine is not essential to decision due to jurisdictional impediments to review of plaintiffs' claims, the court relies, as an alternative ground for dismissal, on application of the political question doctrine to plaintiffs' challenge to the adequacy of relief contained in the Compact and the Section 177 Agreement. Thus, assuming, *arguendo*, that plaintiffs could prosecute a valid claim for review of the adequacy of the alternative relief provided by the Compact and the Section 177 Agreement that was not barred by the statute of limitations, was not subject to collateral estoppel, and would not be subsumed in the withdrawal of jurisdiction, the political question doctrine nevertheless would bar review of their claims.

The political question doctrine is founded upon the long-standing recognition that certain actions of the Government are committed to its political branches. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 167 (1803).

> The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for

> resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature."

*Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981) (footnote omitted)). The Supreme Court has emphasized the breadth of the doctrine's application to the arena of foreign relations, stating that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative-'the political'-Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (citations omitted). "[A]ny policy toward aliens is vitally and intricately interwoven with ... the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). The subject of foreign policy, according to the Court, is one not readily conducive to judicial review:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to

> the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

*Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (citations omitted). In the seminal case, *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court held that a political question was nonjusticiable-not competent subject matter for decision by the courts. *Id.* at 198-99. At the same time, the Court cautioned that

> it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

369 U.S. at 211-12.

1. *Rulings of the Claims Court and the Federal Circuit*

Although defendant has pressed the political question doctrine throughout the procedural history of these companion cases, it has not been addressed in the context of plaintiffs' challenge to the adequacy of the alternative relief provided by the Compact and the Section 177 Agreement. *Juda I* spoke to this issue, as follows:

> Defendant also specifically reserves its right to raise the defense that plaintiffs' claims are

> not justiciable in this court because they present a political question that is to be resolved in the context of government-to-government negotiations between the United States and the Republic of the Marshall Islands. Defendant points out that since 1979 the Bikinians have had a popularly elected constitutional government. In connection with the political question issue, it is noted that the Court of Claims, in recognition of the complexities and costs in time and effort inherent in claims based on government conduct of the type involved here, suggested special jurisdictional legislation that would permit a morally satisfactory resolution of ancient wrongs. *Kabua, Kabua v. United States,* 546 F.2d 381, 385 (Ct. Cl. 1976), *cert. denied,* 434 U.S. 821 (1977).

Neither the political question issue nor the espousal issue is decided at this time. The ratification process for the Compact has not been completed, and neither issue has been briefed fully.

*Juda I* at 445-46.

In *Juda II* Judge Harkins carried the procedural history forward:

> On March 4, 1986, in each case defendant filed motions to dismiss on the ground that the claims were non-justiciable because they now involve a political question. After objections from plaintiffs to piecemeal disposition of the remaining jurisdictional issues, a new schedule was established to provide a vehicle for accelerated briefing of all remaining jurisdictional issues that would ripen after the Compact became effective.
>
> On November 4, 1986, defendant filed amended motions to dismiss in each case. The

> amended motions added lack of jurisdiction over the subject matter as a ground for dismissal and argued that the Section 177 Agreement divested the court of jurisdiction over plaintiffs' claims.

*Juda II* at 669-70. The Claims Court in *Peter II, Juda II,* and *Nitol II* dismissed the claims of the people of the Marshall Islands on jurisdictional grounds without addressing the political question doctrine.

On appeal to the Federal Circuit, defendant raised the political question doctrine as "an alternative, and fundamental, ground for affirming the decisions below." Appellee Brief at 14-26. The Federal Circuit in *People of Enewetak,* however, declined to discuss the political question doctrine, stating that "[b]ecause we affirm the decision of the Claims Court to dismiss appellants' complaints for lack of subject matter jurisdiction, we need not address other issues." 864 F.2d at 136 n. 4.

2. *Ruling of the D.C. Circuit*

Although the Claims Court and Federal Circuit did not rule on defendant's invocation of the political question doctrine, other courts in related cases have spoken to this issue. In *Antolok v. United States,* 873 F.2d 369 (D.C.Cir.1989), the court gave the following preamble:

> The Ninth Circuit is holding in abeyance *Antolok v. Brookhaven Nat'l Laboratories,* No. 88-5749 (9th Cir. ordered held in abeyance Oct. 19, 1988), pending outcome of the instant appeal. In the lower court proceeding in that case, the District Court dismissed plaintiffs' claims as raising a nonjusticiable political question. *Antolok v. Brookhaven Nat'l Laboratories,* Nos. CV 82-2364, CV 82-4978 (C.D. Cal. Jan. 6, 1988).

*Id.* at 372 n. 3. The D.C. Circuit in *Antolok* affirmed the dismissal of the tort claims brought pursuant to the FTCA by the lower court. 873 F.2d at 369. The D.C. Circuit held that, "[i]f there is an uncompensated or inadequately compensated taking, then plaintiffs' remedy is in the Claims Court under the Tucker Act, 28 U.S.C. § 1491(a)(1), not in District Court under the Federal Tort[ ] Claims Act." *Id.* at 378. Chief Judge Wald's concurring opinion distinguished the claims addressed in *Antolok* from those raised in the case at bar. *See id.* at 393 n. 15 ("This takings claim should be distinguished from the takings claim at issue in *People of Enewetak v. United States,* 864 F.2d 134 (Fed. Cir. 1988).... Here the plaintiffs' cause of action is a tort claim under the Federal Tort Claims Act.") (Wald, J., concurring). Nevertheless, a close parallel can be drawn between the FTCA claims brought in *Antolok* and the breach of implied-in-fact contract claims in this case, as they do not raise issues of constitutional dimension.

Judge Sentelle offered the lone caveat in *Antolok* concerning the political questions implicated: "[E]ven if we err in our interpretation of that Act, I would not reach the merits but would conclude that the District Court was without jurisdiction over this matter of international relations by reason of the political question doctrine." *Id.* at 379.[11]

> Judge Sentelle reasoned that the application of
>
> the three inquiries more recently formulated by Justice Powell as defining the analysis [are] necessary to determine the application of the political question doctrine.
>
> (i) Does the issue involve resolution of

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[11] *See supra* note 4.

> questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?
>
> *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

*Antolok*, 873 F.2d at 381.

Judge Sentelle concluded, under the first criterion, that "the decision of the political branches expressed in the Compact negotiated and entered by the Executive and approved by the Legislative Branch is within the area of foreign relations committed by the Constitution to the political branches." *Id.* at 381. He analogized the circumstances to the "Litinov Assignment" at issue in *United States v. Pink*, 315 U.S. 203 (1942), and *United States v. Belmont*, 301 U.S. 324 (1937), categorizing the claims as challenging the recognition of foreign governments and therefore committed to the " 'political department of the government.' " *Antolok*, 873 F.2d at 382 (quoting *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938)). In applying the second criterion, Judge Sentelle rejected characterization of the claims as addressing "simpl[e] questions of tort liability and damages." *Id.* at 383. Rather, "[i]t is the political nature of the recognition question, not the tort nature of the individual claims, that bars our review and in which the Judiciary has no expertise." *Id.* at 383-84. Finally, with respect to the third criterion, Judge Sentelle concluded that "prudential considerations underline the necessity for the application of the [political question] doctrine in this case." *Id.* at 384. He reasoned that, "[f]or the courts of the United States to find the political branches, acting together, to have been impotent in the entry of

recognition of the Marshall Islands would not only drain that voice of its power, but could 'imperil the amicable relations between governments and vex the peace of nations.' " *Id.* at 384 (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918)).

Chief Judge Wald, concurring in the result, stated, "I believe that Judge Sentelle's political question analysis is deeply flawed." *Id.* at 390 (Wald., J., concurring). "If the plaintiffs were attacking the espousal on the ground that the purported government of the Marshall Islands was not truly sovereign, then I would agree that a political question had been posed.... I also believe that any challenge to the adequacy of the settlement is nonjusticiable." *Id.* at 391. Nonetheless, she concluded that plaintiffs' challenge to the espousal based upon international law that "forbids the espousal of claims held by persons who were not nationals of the espousing state at the time the claims arose .... [is] entirely suitable for judicial resolution." *Id.* Chief Judge Wald distinguished plaintiffs' challenge as a "pure question of law which requires no foreign policy expertise and implicates no uniquely political concerns." *Id.* She demurred nevertheless that "this court is precluded from inquiring into the adequacy of the settlement," *id.* at 392, and that "[s]uch a dispute would seem to lie beyond the purview of this court, both because this court lacks the authority to inquire into the adequacy of another government's representation of its own people, and because the United States Government cannot in any event be held responsible for another government's failings." *Id.* Importantly, Chief Judge Wald commented on the practical consequences of judicial examination of the award:

> [A]ny inquiry into the adequacy of the settlement figure would require, in essence, that the district court try the lawsuit. The adequacy

> of the settlement, after all, depends both on the extent of the plaintiffs' injuries-a very difficult determination in itself-and on the likelihood of their collecting a judgment in the face of the government's formidable defenses. The whole point of the espousal, however, was to achieve expeditious settlement of these claims and avoid protracted litigation. I believe that Congress did intend for the withdrawal of federal jurisdiction over the tort claims to be contingent on the validity of the espousal. But it would seem to me a bizarre result if we could uphold the espousal only after completing the sort of extended inquiry which the settlement was designed to prevent.

*Id.* at 393 (footnote omitted).

3. *Political question doctrine applied to the case at bar*

The Federal Circuit has adopted the six-factor inquiry set forth by the Supreme Court in *Baker v. Carr:*

> In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Supreme Court set forth six tests for the presence of a nonjusticiable political question:
>
> > [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision

> already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> ...
>
> The decision that a question is nonjusticiable is not one courts should make lightly. Although each Baker test is independent, *id.*, we must satisfy ourselves that at least one of the six Baker tests is inextricably present in the facts and circumstances in this case before we may conclude that it presents a nonjusticiable political question, *Baker*, 396 U.S. at 217.

*El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1361-62 (Fed. Cir. 2004); *see also Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). Defendant characterizes plaintiffs' claims as involving an "attack upon the Compact and the Section 177 Agreement-agreements that were negotiated and executed by the Executive Branch and approved by Congress-[calling] into question the conduct of U.S. foreign relations." Def.'s Br. filed Sept. 18, 2006, at 21. Defendant would subject plaintiffs' claims to dismissal under the political question doctrine because they implicate the first, fourth, and sixth *Baker* factors.

Because defendant sees "a textually demonstrable constitutional commitment of the issue to a coordinate political department" to conduct of foreign relations involving the United States. *Baker*, 369 U.S. at 217, defendant advocates Judge Sentelle's application of the political question doctrine as an alternative ground for dismissal in *Antolok*. *See Antolok*, 873 F.2d at 379-94 (opinion of Sentelle, J.). Defendant highlights Judge Sentelle's reliance on the Supreme Court's treatment of the "Litinov Assignment" in *Belmont*, 301 U.S. at 330 and *Pink*, 315 U.S. at 229, as pretermitting judicial

review regarding the formation of international agreements or recognition of foreign governments.

Plaintiffs respond with case law that supports the adjudication of takings claims as a core judicial function, "one traditionally and historically committed to the judiciary for resolution." Pls.' Br. filed Dec. 18, 2006, at 32. Plaintiffs rely upon *Lagenegger v. United States*, 756 F.2d 1565 (Fed. Cir. 1985), for the proposition that "consideration of land taking claims is clearly the role of the judiciary according to the Constitution, Amendment V, and ascertainment of 'just compensation' is a judicial function." *Id.* at 1569 (citing *United States v. New River Colleries*, 262 U.S. 341, 343 (1923)). The Supreme Court viewed the issue in *Lynch* somewhat differently:

> Contracts between individuals or corporations are impaired within the meaning of the Constitution (article 1, s 10, cl. 1) whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns. Compare *Principality of Monaco v. Mississippi*, 292 U.S. 313 [(1934)]. ["]The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.["] The rule that the United States may not be sued without its consent is all-embracing.

292 U.S. at 580-81 (footnotes omitted). This binding precedent translates to the proposition that withdrawal of jurisdiction regarding plaintiffs' claims for breach of implied-in-fact contract does not create a claim for just compensation under the Fifth Amendment.

Plaintiffs place great reliance on *Dames & Moore v. Regan*, 453 U.S. 654 (1981), purportedly factually

similar to their case, as authority that their claims do not pose a nonjusticiable political question. *Dames & Moore* is distinguishable from this case. As the Supreme Court delineated in its opinion, resolution of the issue on review was limited to the "narrowest possible ground capable of deciding the case.... We attempt to lay down no general 'guidelines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." 453 U.S. at 660-61. Judge Sentelle's treatment of a similar argument raised in *Antolok* is instructive:

> *Dames & Moore* is not authority for the proposition that we can review the political decision to recognize the government of the Republic of the Marshall Islands on terms including the settlement condition but rather is new authority for the old proposition that we are not the overseers of the political branches in the exercise of their governing responsibility.

873 F.2d at 384.

The dispute precipitating *Dames & Moore* arose out of an agreement entered into between the United States and the Islamic Republic of Iran on January 19, 1981, which secured the release of American hostages. The pivotal issues in the litigation "involve[d] various Executive Orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended claims against Iran that may be presented to an International Claims Tribunal." 453 U.S. at 660. A United States corporation had filed suit against the Islamic Republic of Iran, the Atomic Energy Organization of Iran, and Iranian banks for services performed under a contract with the Atomic Energy Organization. The petitioners in *Dames & Moore* had no involvement in the negotiation of the

Executive Orders and regulations, nor did they ratify them through a democratic process. In contrast, plaintiffs are not United States citizens; they are foreign nationals who participated in both the negotiation of the Compact through their representatives and in the espousal of their claims by expressing support for the agreement through plebiscite in September 1983.

Defendant admonishes that resolution of the issues raised by plaintiffs would manifest a lack of respect due the Executive and Legislative branches of government and potentially cause embarrassment due to varying pronouncements by various departments of Government on one question. Judicial intervention would "signal to Congress this Court's belief that Congress will not appropriately act upon RMI's request for additional funds." Def.'s Br. filed Sept. 15, 2006, at 24. Also, defendant predicts that the court may "render a decision that directly conflicts with Congress' disposition of the RMI's request, causing confusion, embarrassment, and more litigation." *Id.* Plaintiffs cite to *United States v. Munoz-Flores*, 495 U.S. 385 (1990), in which the Supreme Court recognized:

> The Government may be right that a judicial finding that Congress has passed an unconstitutional law might in some sense be said to entail a "lack of respect" for Congress' judgment. But disrespect, in the sense the Government uses the term, cannot be sufficient to create a political question. If it were, *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible.

*Id.* at 390.

While respectful of Judge Sentelle's analysis, the court concludes that adoption of portions of Chief Judge Wald's discussion of the political question doctrine

regarding the FTCA is more appropriate to the resolution of plaintiffs' claims under the Tucker Act. As quoted above, Chief Judge Wald cautioned in *Antolok* that

> any inquiry into the adequacy of the settlement figure would require, in essence, that the district court try the lawsuit. The adequacy of the settlement, after all, depends both on the extent of the plaintiffs' injuries-a very difficult determination in itself-and on the likelihood of their collecting a judgment in the face of the government's formidable defenses. The whole point of the espousal, however, was to achieve expeditious settlement of these claims and avoid protracted litigation. I believe that Congress did intend for the withdrawal of federal jurisdiction over the tort claims to be contingent on the validity of the espousal. But it would seem to me a bizarre result if we could uphold the espousal only after completing the sort of extended inquiry which the settlement was designed to prevent.

873 F.2d at 393 (Wald, J., concurring) (footnotes omitted).

Exploring plaintiffs' challenges to the adequacy of the alternative relief would require a trial on the merits of plaintiffs' claims and scrutiny of an international agreement that both recognized the formation of a foreign state and espoused claims of its nationals. As Chief Judge Wald explained, a challenge narrowly based upon a "purely legal question[ ]," such as the challenge to the ability of a foreign state validly to espouse claims of its nationals under international law, would not be subject to the political question doctrine. *Antolok*, 873 F.2d at 392. Resolution of plaintiffs' claims concerning the adequacy of the alternative relief, in contrast, would

call for the court to retry plaintiffs' claims before the NCT in order to determine the adequacy of the award as a constitutional measure. Judicial resolution of complex issues of fact to determine whether the NCT's award constitutes just compensation and whether the United States is obligated to pay just compensation (either based on that award or its judicial proxy), would run counter to the final resolution of all plaintiffs' claims embodied in the Compact and the Section 177 Agreement.

The court recognizes "a textually demonstrable constitutional commitment of the issue to a coordinate political department," based upon the factual similarities to the Supreme Court's treatment to the Litinov Assignment in *Belmont*, 301 U.S. at 330, and in *Pink*, 315 U.S. at 229. *See Baker*, 369 U.S. at 217. Review of plaintiffs' claims regarding the adequacy of compensation under the Section 177 Agreement and the NCT would explore the formation of an international agreement and recognition of a foreign government, responsibilities charged to the Executive and Legislative branches of government.

In *Belmont* the Supreme Court reviewed the impact of the political question doctrine upon the challenge to the Litinov Assignment, which "br[ought] about a final settlement of the claims and counterclaims between the Soviet government and the United States; and it was agreed that the Soviet government would take no steps to enforce claims against American nationals; but all such claims were released and assigned to the United States." 301 U.S. at 326. Similar to the circumstances in this case, "coincident with the assignment set forth in the complaint, the President recognized the Soviet government, and normal diplomatic relations were established between that government and the government of the United States." *Id.* at 330. The

Supreme Court's description of the nature of the agreement aids in placing plaintiffs' claims in their proper context:

> The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government.

*Id.*

Plaintiffs' objections to the adequacy of the settlement's terms call for an examination of the terms of the "international compact between the two governments" and investigation of complex issues of fact, not a narrow legal issue. *See id.* at 326. In *Ozanic v. United States,* 188 F.2d 228 (2d Cir. 1951), Judge Learned Hand addressed the ability of the President to settle foreign claims arising out of the recognition of the Yugoslav government:

> The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such

> controversies. The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations.

*Id.* at 231 (footnote omitted). These factors support the conclusion that plaintiffs' claims impinge on the conduct of foreign affairs that the Constitution delegates to the Executive and Legislative branches. Moreover, the approval of the settlement terms by plebiscite in September 1983 would support a ruling that any dissatisfaction with the terms of the Compact and the Section 177 Agreement should be directed to the government of the RMI, not that of the United States.

Even if plaintiffs' claims could survive the bar of the statute of limitations, the preclusive effect of collateral estoppel, and withdrawal of jurisdiction, the political question doctrine mandates declining judicial review of a challenge to the adequacy of the alternative relief afforded and delimited by the Compact Act and the Section 177 Agreement.

**CONCLUSION**

Based on the foregoing, defendant's motion is granted, and the Clerk of the Court shall dismiss plaintiffs' Amended Complaint without prejudice for lack of subject matter jurisdiction.

**IT IS SO ORDERED.**

No costs.

s/ Christine O.C. Miller

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**Christine Odell Cook Miller**
Judge

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

2007-5175

THE PEOPLE OF BIKINI, by and through the Kili/Bikini/Ejit Local and Government Council,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 06-CV-288,

Judge Christine O.C. Miller.

**ORDER**

NOTE: This order is nonprecedential.

# UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 3, 2009.

FOR THE COURT,

/s/ Jan Horbaly

Jan
Horbaly
Clerk

Dated: 05/27/2009

cc: Patricia A. Millett

Brian M. Simkin

PEOPLE OF BIKINI V US, 2007-5175
(CFC - 06-CV-288)

**Constitution of the United States**
**Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**The Compact Act, Pub. L. No. 99-239 (Jan. 14, 1986).**

**Joint Resolution**
**To approve the "Compact of Free Association", and for other purposes.'**
Whereas the United States, in accordance with the Trusteeship Agreement, the Charter of the United Nations and the objectives of the international trusteeship system, has promoted the development of the peoples of the Trust Territory toward self-government or independence as appropriate to the particular circumstances of the Trust Territory and its peoples and the freely expressed wishes of the peoples concerned; and

Whereas the United States, in response to the desires of the peoples of the Federated States of Micronesia and the Marshall Islands expressed through their freely elected representatives and by the official pronouncements and enactments of their lawfully constituted governments, and in consideration of its own obligations under the Trusteeship Agreement to promote self determination, entered into political status negotiations with representatives of the peoples of the Federated States of Micronesia, and the Marshall Islands; and

Whereas these negotiations resulted in the "Compact of Free Association" which, together with its related agreements, was signed by the United States and by the Federated States of Micronesia and the Republic of the Marshall Islands on October 1, 1982 and June 25,1983, respectively; and

Whereas the Compact of Free Association was approved by majorities of the peoples of the Federated States of Micronaia and the Marshall Islands in United Nations-observed plebiscites conducted on June 21, 1983 and September 7, 1983, respectively; and

Whereas the Compact of Free Association has been approved by the Governments of the Federated States of Micronesia and the Marshall Islands in accordance with their respective constitutional processes, thus completing fully for the Federated States of Micronesia and the Marshall Islands their domestic approval processes with respect to the Compact as contemplated in Compact Section 411:

Now, therefore, be it
***Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,***

**The Compact Act, Pub. L. No. 99-239 (Jan. 14, 1986).**

**SECTION 177**

(a) The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958.

(b) The Government of the United States and the Government of the Marshall Islands shall set forth in a separate agreement provisions for the just and adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens and which have not as yet been compensated or which in the future may arise, for the continued administration by the Government of the United States of direct radiation related medical surveillance and treatment programs and radiological monitoring activities and for such additional programs and activities as may be mutually agreed, and for the assumption by the Government of the Marshall Islands of responsibility for enforcement of limitations on the utilization of affected areas developed in cooperation with the Government of the United States and for the assistance by the Government of the United States in the exercise of such responsibility as may be mutually agreed. This separate agreement shall come into effect simultaneously with this Compact and shall remain in effect in accordance with its own terms.

(c) The Government of the United States shall provide

to the Government of the Marshall Islands, on a grant basis, the amount of $150 million to be paid and distributed in accordance with the separate agreement referred to in this Section, and shall provide the services and programs set forth in this separate agreement, the language of which is incorporate into this Compact.

**The Compact Act, Pub. L. No. 99-239 (Jan. 14, 1986).**

## SECTION 311

Section 311

(a) The Government of the United States has full authority and responsibility for security and defense matters in or relating to the Marshall Islands and the Federated States of Micronesia.

(b) This authority and responsibility includes:

(1) the obligation to defend the Marshall Islands and the Federated States of Micronesia and their peoples from attack or threats thereof as the United States and its citizens are defended;

(2) the option to foreclose access to or use of the Marshall Islands and the Federated States of Micronesia by military personnel or for the military purposes of any third country; and

(3) the option to establish and use military areas and facilities in the Marshall Islands and the Federated States of Micronesia, subject to the terms of the separate agreements referred to in Sections 321 and 323.

(c) The Government of the United States confirms that it shall act in accordance with the principles of international law and the Charter of the United Nations in the exercise of this authority and responsibility.

## SECTION 177 AGREEMENT

### Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association

*PREAMBLE*

The Government of the United States and the Government of the Marshall Islands:

*In recognition* of the enduring friendship between the United States of America and the Republic of the Marshall Islands;

*In reaffirmation* of the compact of Free Association (the Compact) between the Government of the United States and the Government of the Marshall Islands;

*In fulfillment* of the provisions of Section 177 of the Compact relating to the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958 (the Nuclear Testing Program);

*In recognition* of the authority and responsibility of the Government of the Marshall Islands to provide medical and health care to all of the people of the Marshall Islands; and the expressed desire of the Government of the Marshall Islands to include in its integrated, comprehensive and universal medical health-care system, the health-care and surveillance programs and radiological monitoring activities contemplated in United States Public Law 95-134 and United States Public Law 96-205;

*In recognition* of the authority and responsibility of the Government of the Marshall Islands to provide for the welfare of all the people of the Marshall Islands; and the expressed desire of the Government of the Marshall Islands to create and maintain, in perpetuity, a means to address past, present and future consequences of the Nuclear Testing Program, including the resolution of resultant claims; and

*In recognition* of contributions and sacrifices made by the people of the Marshall Islands in regard to the Nuclear Testing Program;

NOW THEREFORE AGREE:

**Article I**

*The Fund*

*Section 1 – Creation*

In fulfillment of its obligations under Section 177 of the Compact, the Government of the United States shall provide to the Government of the Marshall Islands, on the effective date of this Agreement, the sum of $150 million to create a fund (the Fund).

*Section 2- Management*

In furtherance of the desire of the Government of the Marshall Islands to provide, in perpetuity, a means to address past, present and future consequences of the Nuclear Testing Program:

(a) The Government of the Marshall Islands shall cause the Fund to be invested with the performance goal of producing for each year of the existence of the Fund average annual proceeds of at least $18 million (Annual

Proceeds) for disbursement in accordance with this Agreement.

(b) The Government of the Marshall Islands, in order to achieve the performance goal of the Fund, shall retain as trustee and manager of the Fund (Fund Manager) an United States investment management company which has demonstrated substantial experience in the administration of trusts and which has funds under management in excess of $1 billion. The Fund Manager shall make disbursements in accordance with the provisions of this Agreement to the designated recipients in the name of "The Republic of the Marshall Islands Nuclear Claims Fund".

(c) The Fund shall be invested in bonds, notes and other instruments of investment grade and of United States nationality, including both debt and equity issues, common or preferred stocks, money market funds, certificates of indebtedness and mutual funds. The Government of the United States shall impose no transaction fee or intermediary charge on the investment of the Fund in instruments of the Government of the United States.

(d) Except as may be otherwise required by this Agreement and to achieve its desire to provide a perpetual means of addressing the special needs and unique circumstances of the people of the Marshall Islands resulting from the Nuclear Testing Program , the Government of the Marshall Islands shall not permit nor shall the Fund Manager make disbursements from the Fund.

(e) For purposes of taxation only, the trust into which the Fund is placed pursuant to this Article shall be deemed to be a charitable trust under the laws of the

United States and the Republic of the Marshall Islands.

**Article II**

*Distribution of Annual Proceeds*

The Fund Manager shall disburse Annual Proceeds in accordance with Article III of this Agreement and as follows:

*Section 1 - Health, Food, Agricultural Maintenance and Radiological Surveillance*

(a) $30 million to the Government of the Marshall Islands, to be disbursed in annual amounts of $2 million for the 15-year period commencing one calendar quarter after the effective date of this Agreement. The Government of the Marshall Islands shall use these sums to obtain technical assistance, on a reimbursable basis, from the United States Public Health Service and other agencies of the Government of the United States. The Government of the United States shall provide such technical assistance including United States contractor services to assist the Government of the Marshall Islands to include, in its health-care system, health-care programs and services related to consequences of the Nuclear Testing Program and contemplated in United States Public Law 95-134 and United States Public Law 96-205. Such technical assistance shall be obtained in accordance with Section 226 of the Compact, the provisions of the Federal Programs and Services Agreement and such separate implementing agreements as may from time to time be concluded. Such technical assistance shall, at the request of the Government of the Marshall Islands, include a whole body counter and the training of its operator. The whole body counter shall be located in a suitable facility chosen and supplied by the Government of the Marshall Islands. The Technical

assistance provided for in this subsection may include professional personnel services and dosimetry and bioassay services.

(b) Annual disbursements specified in this Section are in addition to the funds referred to in Section 211 (a) (3), 216 (a) (2) and 211 (b) of the Compact, which may also be expended by the Government of the Marshall Islands to provide its citizens with health-care programs and services elated to consequences of the Nuclear Testing Program.

(c) The Government of the Marshall Islands may dedicate any part of the annual disbursements specified in this Section to the financing, including matching financing, of other related health-care and research programs and services of the Government of the United States which are otherwise available to the Government of the Marshall Islands.

(d) At the request of the Government of the Marshall Islands, the Government of the United States shall provide technical assistance, programs and services, on a reimbursable basis, to continue the planting and agriculture maintenance program on Enewetak and to continue the food programs of the Bikini people and Enewetak people for as long as such technical assistance, programs and services may be required. Such technical assistance, programs and services shall be obtained in accordance with Section 226 of the Compact, the provisions of the Federal Programs and Services Agreement and such separate implementing agreements as may from time to time be concluded.

(e) $3 million to the Government of the Marshall Islands for the purpose of the conducting medical surveillance and radiological monitoring activities, to be disbursed in average annual amounts of $1 million for

the three-year period commencing on the effective date of this Agreement. The results of such medical surveillance and radiological monitoring activities shall be filed with the Claims Tribunal referred to in Article IV of this Agreement.

*Section 2 - People of Bikini*

$75 million to the Bikini Distribution Authority referred to in Article III of this Agreement, in payment of claims arising out of the Nuclear Testing Program for loss or damage to property and person of the people of Bikini to be disbursed in quarterly amounts of $1.25 million for the 15-year period commencing one calendar quarter after the effective date of this Agreement, and which shall be distributed, placed in trust or otherwise invested as the Bikini Distribution Authority may determine consistent with this Agreement.

*Section 3 - People of Enewetak*

$48.75 million to the Enewetak Distribution Authority referred to in Article III of this Agreement, in payment of claims arising out of the Nuclear Testing Program for loss or damage to property and person of the people of Enewetak, to be disbursed in quarterly amounts of $812,500 for the 15-year period commencing one calendar quarter after the effective date of this Agreement, and which shall be distributed, placed in trust or otherwise invested as the Enewetak Distribution Authority may determine consistent with this Agreement.

*Section 4 - People of Rongelap*

$37.5 million to the Rongelap Distribution Authority referred to in Article III of this Agreement, in payment of claims arising out of the Nuclear Testing Program for loss or damage to property and person of the people of

Rongelap, to be disbursed in quarterly amounts of $625,000 for the 15-year period commencing one calendar quarter after the effective date of this Agreement, and which shall be distributed, placed in trust or otherwise invested as the Rongelap Distribution Authority may determine consistent with this Agreement.

*Section 5 - People of Utrik*

$22.5 million to the Utrik Distribution Authority referred to in Article III of this Agreement, in payment of claims arising out of the Nuclear Testing Program for loss or damage to property and person of the people of Utrik, to be disbursed in quarterly amounts of $375,000 for the 15-year period commencing one calendar quarter after the effective date of this Agreement, and which shall be distributed, placed in trust or otherwise invested as the Utrik Distribution Authority may determine consistent with this Agreement.

*Section 6 - Claims Adjudication Funds*

(a) $500,000 to the Government of the Marshall Islands to provide for the establishment of the Claims Tribunal, to be disbursed prior to the first anniversary of the effective date of this Agreement.

(b) $500,000 annually to the Claims Tribunal during the term of its existence for its operation, to be disbursed in quarterly amounts of $125,000 commencing one calendar quarter after the first anniversary of the effective date of this Agreement.

(c) $45.75 million to be made available to the Claims Tribunal as necessary for whole or partial payment of monetary awards made by the Claims Tribunal pursuant to Article IV of this Agreement, to be disbursed in

annual amounts of up to $2.25 million for the 3-year period commencing on the effective date of this Agreement, and in annual amounts of up to $3.25 million for the 12-year period commencing on the third anniversary of the effective date of this Agreement.

*Section 7 - Other Disbursements*

(a) In the event that Annual Proceeds are not sufficient to meet the disbursement schedules set forth in Sections 1 through 6 of this Article, disbursements shall be made from the Fund on an annual basis to supplement Annual Proceeds in the amount of the difference.

(b) All monetary awards made by the Claims Tribunal pursuant to Article IV of this Agreement shall be paid on an annual pro-rata basis from available funds until all such awards are paid in full. If, in any year, the annual amount made available pursuant to subsection 6 (c) of this Article is not exhausted, the amount not required for that year shall remain in the Fund and shall be made available for disbursement in payment of monetary awards made by the Claims Tribunal in subsequent years.

(c) Commencing on the fifteenth anniversary of the effective date of this Agreement, not less than 75 percent of Annual Proceeds shall be available for disbursement in whole or partial payment of monetary awards made by the Claims Tribunal.

(d) Any Annual Proceeds which are not required for the disbursements set forth in Section 1 through 6 and subsection 7(b) and 7(c) of this Article shall either be made a part of the Fund or be used by the Government of the Marshall Islands for other programs and services for the people of the Marshall Islands as their unique

needs and circumstances resulting from the Nuclear Testing Program may require, including continuation of the technical assistance referred to in Section 1 of this Article, the operation of the Claims Tribunal, the survey and analysis of the radiological status of the Marshall Islands, and distributions to local government councils so that they may establish and maintain programs and services for their people as their unique needs and circumstances resulting from the Nuclear Testing Program may require.

*Section 8 - Bikini, Enewetak, Rongelap and Utrik Trusts*

In order to provide an additional long-term means to address consequences of the Nuclear Testing Program, the people of Bikini, Enewetak, Rongelap and Utrik shall each for their own benefit provide for the establishment of a trust funded with all or a portion of the Annual Proceeds they shall receive under this Agreement. Each trust shall be designed to provide a perpetual source of income for its respective recipients, and shall be developed in consultation with the Government of the Marshall Islands. The understandings reached shall, in consultation with the Government of the United States, be appended to this Agreement as Agreed Minutes. The establishment of each trust in accordance with the applicable Agreed Minute is a condition to disbursement of Annual Proceeds by the Fund Manager to the respective distribution authorities.

* * *

**Article IV**

*Claims Adjudication Process*

In furtherance of the desire of the Government of the Marshall Islands to provide an additional long-term means for compensating claims resulting from the Nuclear Testing Program:

*Section 1 - Establishment and Operation of the Claims Tribunal*

(a) The Government of the Marshall Islands, prior to the first anniversary of the effective date of this Agreement, shall establish a Claims Tribunal, in accordance with its constitutional processes and this Agreement. The Claims Tribunal shall have jurisdiction to render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based on, arise out of, or are in any way related to the Nuclear Testing Program, and disputes arising from distributions under Article II and III of this Agreement. This section confers in the Claims Tribunal no jurisdiction over the United States, its agents, employees, contractors, citizens or nationals with respect to claims of the Government, citizens or nationals of the Marshall Islands arising out of the Nuclear Testing Program.

(b) In the exercise of its jurisdiction, the Claims Tribunal shall be independent of the legislative and executive powers of the Government of the Marshall Islands.

(c) The Claims Tribunal shall have power to issue writs and other processes, make rules and orders and promulgate other procedural regulations, not inconsistent with the laws of the Marshall Islands and this Agreement, as may be required. Such power shall include the authority to make orders for the attendance of witnesses with or without documents, and to make orders for the disposal of exhibits.

(d) Members of the Claims Tribunal shall be persons qualified by education, experience and character to discharge judicial office, shall hold office during good behavior for a set term of at least three years, and shall be appointed pursuant to procedures adopted by the Government of the Marshall Islands in accordance with its constitutional processes.

e) A member of the Claims Tribunal may be removed from office only pursuant to procedures adopted by the Government of the Marshall Islands in accordance with its constitutional processes and only on the ground of clear failure or inability faithfully to discharge the duties of such office or for the commission of treason, bribery, or other high crimes or abuses inconsistent with the authority of his office.

(f) No member of the Claims Tribunal shall take part in the decision of a claim as to which he has a conflict of interest or the appearance of a conflict of interest.

(g) The compensation of a Claims Tribunal member shall not be changed during his term of office.

*Section 2 - Awards and Costs of the Claims Adjudication Process*

In making any award, the Claims Tribunal shall take into account the validity of the claim, any prior compensation made as a result of such claim and such other factors as it may deem appropriate. Costs of proceedings before the Claims Tribunal shall be a charge on Annual Proceeds, subject to determination of the Claims Tribunal, the laws of the Marshall Islands and distributions made under Sections 1 through 6 of Article II of this Agreement. Such costs shall also include the cost of defending the Fund.

*Section 3 - Governing Law*

In determining any legal issue, the Claims Tribunal may have reference to the laws of the Marshall Islands, including traditional law, to international law and, in the absence of domestic or international law, to the laws of the United States.

* * *

**Article IX**

*Changed Circumstances*

If loss or damage to property and person of the citizens of the Marshall Islands, resulting from the Nuclear Testing Program, arises or is discovered after the effective date of this Agreement, and such injuries were not and could not reasonably have been identified as of the effective date of this Agreement, and if such injuries render the provisions of this Agreement manifestly inadequate, the Government of the Marshall Islands may request that the Government of the United States provide for such injuries by submitting such a request to the Congress of the United States for its consideration. It is understood that this Article does not commit the Congress of the United States to authorize and appropriate funds.

**Article X**

*Espousal*

*Section 1 - Full Settlement of All Claims*

This Agreement constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are

based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, its agents, employees, contractors and citizens and nationals, and of all claims for equitable or any other relief in connection with such claims including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions.

*Section 2 - Termination of Legal Proceedings*

The Government of the Marshall Islands shall terminate any legal proceedings in the courts of the Marshall Islands against the United States, its agents, employees, contractors and citizens and nationals, involving claims of the Government, citizens and nationals of the Marshall Islands, arising out of the Nuclear Testing Program and shall nullify all attachments or any judgments attained relating to such proceedings.

**Article XI**

*Indemnity*

Subject to Article IX, and in consideration for the payment of the amounts set forth in this Agreement, the Government of the Marshall Islands, on behalf of itself and its citizens and nationals, shall indemnify and hold harmless the United States, its agents, employees, contractors and citizens and nationals, from all claims set forth in Article X of this Agreement, and all actions or proceedings which may hereafter be asserted or brought by or on behalf of the Government of the Marshall Islands, its citizens and nationals, in any court or other judicial forum based on, arising out of or in any way related to the Nuclear Testing Program. The

amount of such indemnification shall not, in the aggregate, exceed $150 million, and the Government of the Marshall Islands shall use or cause the Fund, or other sums available to it, to be used as necessary to cover or satisfy the indemnification set forth in this Article.

**Article XII**

*United States Courts*

All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed.

**Article XIII**

*Administrative Provisions*

*Section 1 - Effective Date*

This Agreement shall come into effect simultaneously with the Compact in accordance with Section 177 of the Compact.

*Section 2 – Implementation*

The Government of the Marshall Islands shall take all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement and the implementation of this Agreement in accordance with its terms.

*Section 3 – Consultation*

(a) The Government of the United States and the Government of the Marshall Islands shall consult at the request of either of them on matters relating to the provisions of this Agreement.

(b) The Government of the Marshall Islands may, from time to time, request from the Government of the United States assistance of an advisory nature with respect to the implementation of this Agreement, including the investment of the Fund in instruments of the Government of the United States and the establishment and operation of the Claims Tribunal. Such advisory assistance shall be provided in accordance with the provisions of Section 226 of the Compact.

*Section 4 – Amendment*

This Agreement may be amended at any time by mutual consent of the Government of the United States and the Government of the Marshall Islands.

*Section 5 – Duration*

This Agreement shall remain in full force and effect until terminated or otherwise amended by mutual consent.

*Section 6 – Definitions*

(a) The Definition of Terms set forth in Article VI of Title Four of the Compact is incorporated in this Agreement.

(b) The term "citizens and nationals" of the Marshall Islands or United States, as the case may be, includes:

(1) a natural person who is a citizen of the Marshall

Islands or the United States, and

(2) a corporation or other legal entity which is organized under the laws of the Marshall Islands or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico.

Nos. 09-498 and 09-499

# In the Supreme Court of the United States

ISMAEL JOHN, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

PEOPLE OF BIKINI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

In 1983, the people of the Marshall Islands approved by popular vote a Compact of Free Association between the Government of the United States and the Government of the Marshall Islands. As part of the Compact, the Government of the Marshall Islands espoused and settled claims of its citizens against the United States arising out of the nuclear testing program conducted in the Marshall Islands between 1946 and 1958. In the Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986), Congress ratified the Compact's espousal provisions as a "full and final settlement" of all claims arising from the nuclear testing program, and enacted the Compact's provision that "[n]o court of the United States shall have jurisdiction to entertain such claims." The questions presented by this case are:

1. Whether the Compact of Free Association Act bars the Court of Federal Claims from exercising Tucker Act jurisdiction to entertain petitioners' suits seeking just compensation for alleged takings of property arising out of the nuclear testing program in the Marshall Islands between 1946 and 1958.

2. Whether a challenge to the Government of the Marshall Islands' espousal and settlement of petitioners' claims against the United States involves a nonjusticiable political question.

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# In the Supreme Court of the United States

No. 09-498

ISMAEL JOHN, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

No. 09-499

PEOPLE OF BIKINI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is published at 554 F.3d 996. The opinions of the Court of Federal Claims are published at 77 Fed. Cl. 788 (Pet. App. 11a-114a) and 77 Fed. Cl. 744 (09-499 Pet. App. 10a-107a).[1]

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 09-498.

## JURISDICTION

The judgment of the court of appeals was entered on January 29, 2009. Petitions for rehearing were denied on May 27, 2009 (Pet. App. 115a-116a; 08-499 Pet. App. 108a-109a). On July 28, 2009, the Chief Justice extended the time within which to file petitions for a writ of certiorari to and including September 24, 2009. On September 14, 2009, the Chief Justice further extended the time to October 23, 2009, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Republic of the Marshall Islands (RMI) comprises 29 atolls and five islands in the Pacific Ocean. Pet. App. 2a. The Marshall Islands were formerly part of the Trust Territory of the Pacific Islands, which the United States administered pursuant to a United Nations-approved trusteeship from 1947 until 1986. See Trusteeship Agreement for the Former Japanese Mandated Islands (Trusteeship Agreement), Apr. 2, 1947, 61 Stat. 3301, 8 U.N.T.S. 189 (Pet. App. 281a-288a).

The trusteeship concluded with the adoption of a Compact of Free Association (Compact) between the Government of the United States and the Government of the Marshall Islands. See Compact of Free Association Act of 1985 (Compact Act), Pub. L. No. 99-239, § 201, 99 Stat. 1800 (1986) (Pet. App. 180a-248a) (setting out the text of the Compact). In September 1983, the people of the Marshall Islands approved the Compact in voting plebiscites monitored by observers from the United Nations. Compact Act preamble, 99 Stat. 1770 (Pet. App. 118a). In turn, Congress adopted and the President signed a joint resolution approving the Com-

pact, and the President duly proclaimed the Compact effective on October 21, 1986. Compact Act § 101(b), 48 U.S.C. 1901(b) (Pet. App. 124a); Proclamation No. 5564, 51 Fed. Reg. 40,399-40,400 (1986).

Among other things, the Compact settled claims against the United States arising from the nuclear testing program conducted in the Marshall Islands between June 1946 and August 1958. In Section 177 of the Compact, 99 Stat. 1812 (Pet. App. 204a-205a), and a subsidiary Agreement for the Implementation of Section 177 of the Compact (Section 177 Agreement), June 25, 1983, U.S.-Marsh. Is., Hein's No. KAV 1271 (Pet. App. 261a-279a), the Government of the Marshall Islands espoused the claims of its citizens and agreed to settle them.[2] The United States accepted the responsibility for various claims "owing to citizens of the Marshall Islands * * * resulting from the nuclear testing program," including claims "for loss or damage to property [or] person." Compact § 177(a), 99 Stat. 1812 (Pet. App. 204a). And the United States agreed to contribute $150 million to an investment fund to be administered by the RMI and managed by a professional fund manager, with the income and, if necessary, the principal to be disbursed for various purposes, including compensation for claims. Section 177 Agreement Arts. I-II (Pet. App. 262a-269a). The RMI agreed to establish a Claims Tribunal to decide claims "in any way related to the Nuclear Testing Program," including property claims, and to pay tribunal awards from the fund. *Id.* Art. II, §§ 6, 7(b), Art. IV, § 1 (Pet. App. 268a, 271a-272a).

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[2] The Government of the Marshall Islands represented in the Compact that it had "full authority" under the Constitution of the Marshall Islands to fulfill its responsibilities, including the espousal. Compact § 471(a), 99 Stat. 1834 (Pet. App. 246a)

The Section 177 Agreement also included a provision entitled "Changed Circumstances" that authorized the RMI to petition Congress for additional funds under specified conditions. Section 177 Agreement Art. IX (Pet. App. 276a). The agreement specified that "[i]t is understood that this Article does not commit the Congress of the United States to authorize and appropriate [such additional] funds." *Ibid.*

To effectuate the settlement, the Compact itself, the Compact Act, and the Section 177 Agreement all provided that the settlement would serve as the final and unreviewable resolution of any claim that the people of the Marshall Islands might have against the United States. See Section 177 Agreement Art. X, § 1 (Pet. App. 276a) ("This Agreement constitutes the full settlement of all claims, past, present, or future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States"); *id.* Art. XII (Pet. App. 278a) ("All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims"); Compact Act § 103(g)(1), 48 U.S.C. 1903(g)(1) (Pet. App. 144a) ("It is the intention of the Congress of the United States that the provisions of Section 177 of the [Compact] and the [Section 177 Agreement] constitute a full and final settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred except insofar as provided for in the Section 177 Agreement."); see also Compact § 177(c), 99 Stat. 1812 (Pet. App. 205a) ("[T]he lan-

guage of [the Section 177 Agreement] is incorporated into this Compact.").[3]

The United States and the RMI have subsequently negotiated and adopted amendments to the Compact, see Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720, but the amended Compact expressly states that it "has no effect on * * * Section 177" or on the Section 177 Agreement. § 201(b), 117 Stat. 2808.

2. Petitioners are citizens of the RMI. They seek compensation under the Fifth Amendment's Just Compensation Clause for, *inter alia*, the United States' taking of Bikini and Enewetak Atolls during the nuclear testing program. Petitioners first sought compensation in the early 1980s, when they filed Tucker Act suits in the Court of Claims (*Juda* v. *United States* and *Peter* v. *United States*) on behalf of the inhabitants of Bikini and Enewetak atolls, respectively. Pet. App. 25-28a. Twelve other actions, consolidated under the caption *Nitol* v. *United States*, were filed on behalf of some inhabitants of Rongelap and Utrik and other areas in the Marshall Islands downwind of the test sites. *Id.* at 26a-28a.[4]

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[3] In addition to being an agreement between the United States and the RMI, the Compact has the force of federal law. Compact § 471(c), 99 Stat. 1834 (Pet. App. 247a).

[4] Additionally, thousands of residents of downwind atolls filed suit in the District Court for the District of Columbia pursuant to the Federal Tort Claims Act, seeking damages for personal injuries and death resulting from their exposure to dangerous levels of radiation. *Antolok* v. *United States*, Civil Action No. 83-02471 (D.D.C. June 16, 1987), aff'd, 873 F.2d 369 (D.C. Cir. 1989); see Pet. App. 50a. Micronesian Islanders also filed similar or parallel claims in the Central District of California. *Antolok* v. *Brookhaven Nat'l Labs.*, No. CV 82-2364 (C.D. Cal. Jan. 6, 1988); Pet. App. 101a.

Prior to enactment of the Compact Act, the Claims Court[5] held that the Enewetak plaintiffs' takings claims were barred by the statute of limitations. *Peter* v. *United States*, 6 Cl. Ct. 768, 775 (1984). After the Compact Act became effective, the court dismissed the remaining claims upon the ground that the Compact Act withdrew Tucker Act jurisdiction. *Juda* v. *United States*, 13 Cl. Ct. 667, 689-690 (1987); *Peter* v. *United States*, 13 Cl. Ct. 691, 692 (1987). The Federal Circuit affirmed the dismissal of claims in *Peter* and *Nitol*, adopting the Claims Court's conclusion that the Compact Act withdrew subject matter jurisdiction. *People of Enewetak* v. *United States*, 864 F.2d 134, 136 (1988), cert. denied, 491 U.S. 909 (1989). The court of appeals also dismissed with prejudice an appeal of the *Juda* claimants following the enactment of special legislation appropriating $90 million for the purpose of funding the Resettlement Trust Fund for the people of Bikini. *People of Bikini* v. *United States*, 859 F.2d 1482 (Fed. Cir. 1988).

3. Petitioners subsequently presented their claims to the Nuclear Claims Tribunal established by the RMI pursuant to the Section 177 Agreement. In 2000 and 2001, the tribunal awarded the Enewetak and Bikini petitioners $385.9 million and $563.3 million, respectively. Pet. App. 4a. According to petitioners, the Claims Tribunal has insufficient funds to pay the awards, and the RMI has submitted a "Changed Circum-

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[5] After the cases were filed, Congress transferred the trial functions of the Court of Claims to a newly created United States Claims Court, which has since been renamed the Court of Federal Claims. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 39; Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Tit. IX, § 902, 106 Stat. 4516.

stances" petition to Congress for additional appropriations. *Ibid.*[6]

4. In April 2006, petitioners again filed suit against the United States in the Court of Federal Claims, effectively renewing the substance of their earlier claims. Pet. App. 11a; 09-499 Pet. App. 10a. Petitioners also alleged that, by failing to provide funding for the Nuclear Claims Tribunal awards, Congress had deprived petitioners of their property—*viz.*, the Enewetak and Bikini Atolls, as well as their claims before the tribunal—without just compensation, in violation of the Fifth Amendment. Pet. App. 13a; 09-499 Pet. App. 12a. The United States moved to dismiss, arguing principally that the Compact Act withdrew Tucker Act jurisdiction over petitioners' claims. In published decisions dated August 2, 2007, the Court of Federal Claims granted the motions to dismiss. Pet. App. 11a-114a; 09-499 Pet. App. 10a-13a.

5. The court of appeals affirmed. Pet. App. 1a-9a.

The court of appeals held that the Section 177 Agreement settled petitioners' claims and unambiguously withdrew Congress's consent to sue the United States

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[6] In 2007, both Houses of Congress held hearings on the question of additional compensation. See *Republic of the Marshall Islands: Hearing on S. 1756 Before the Senate Comm. on Energy and Natural Resources*, 110th Cong., 1st Sess. (2007); *An Overview of the Compact of Free Association Between the United States and the Republic of the Marshall Islands: Are Changes Needed? Hearing and Briefing Before the Subcomm. on Asia, the Pacific, and the Global Environment of the House Comm. on Foreign Affairs*, 110th Cong., 1st Sess. (2007). As the chairman of the Senate committee recently explained in re-introducing the legislation, changes in administration in both the RMI and the United States have slowed congressional consideration of the RMI's request. 156 Cong. Rec. S54 (daily ed. Jan. 20, 2010) (remarks of Sen. Bingaman); see also S. 2941, 111th Cong., 2d Sess. (2010).

concerning those claims. Pet. App. 7a-8a. Because "[t]he language of the Section 177 Agreement presents no ambiguities whatsoever," the court held, there was no occasion to resolve any ambiguities to avoid constitutional questions. *Id.* at 8a.

The court also noted that petitioners challenged the validity of the Government of the Marshall Islands' espousal and settlement of its citizens' claims. The court held that the challenge to the RMI's capacity to enter into agreements with the United States presented a nonjusticiable political question. Pet. App. 9a (citing *United States* v. *Pink*, 315 U.S. 203, 229 (1942)).

6. Petitioners sought rehearing en banc, which the court denied without recorded dissent. Pet. App. 115a-116a.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any precedent of this Court or another court of appeals. The United States and the Marshall Islands settled all claims including the takings claims, and as part of that settlement agreed to preclude further review of those claims in any federal court. The Federal Circuit's application of the straightforward and unambiguous text of the relevant statutory provisions does not warrant further review. And to the extent that petitioners challenge the premise that the Compact settled the claims, they rest on the clearly unavailing theory that Congress and the President could not constitutionally recognize that the Government of the Marshall Islands had the capacity to do so, despite its undertaking to the United States.

1. The court of appeals correctly held that the Compact Act unambiguously withdrew Tucker Act jurisdic-

tion with respect to petitioners' takings claims. That holding does not conflict with any decision of another court of appeals. See *Antolok* v. *United States*, 873 F.2d 369, 375 (D.C. Cir. 1989) ("[In the Compact Act,] Congress could hardly have spoken more explicitly in stripping jurisdiction."). Nor does it conflict with any interpretive principle set out in the decisions of this Court on which petitioners rely: when a statute is unambiguous, the doctrine of constitutional avoidance plays no role in its interpretation. Petitioners insist that there is ambiguity where there is none and the court of appeals discerned none. Petitioners' disagreement with how the courts below read the Section 177 Agreement simply does not warrant further review.

a. As the court of appeals emphasized (Pet. App. 7a), Article X of the Section 177 Agreement, which is entitled "Full Settlement of All Claims," states that the Agreement

> constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, * * * including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including * * * the courts of the United States and its political subdivisions.

Pet. App. 276a-277a. Article XII, entitled "United States Courts," then states:

> All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such

> claims, and any such claims pending in the courts of the United States shall be dismissed.

*Id.* at 278a.

Congress reiterated its purpose to withdraw jurisdiction in Title I of the Compact Act, which, *inter alia*, sets forth the legal and policy positions of the United States regarding the Compact. Specifically, Section 103(g)(1) of the Compact Act states that "[i]t is the intention of the Congress" that Section 177 of the Compact and the Section 177 Agreement "constitute a full and final settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred except insofar as provided for in the Section 177 Agreement." 48 U.S.C. 1903(g)(1) (Pet. App. 144a).

b. Petitioners contend that, pursuant to the doctrine of constitutional avoidance, the Federal Circuit should have interpreted the Compact Act as merely requiring exhaustion of procedures before the Claims Tribunal established by the RMI as a precondition to the subsequent filing of a Tucker Act claim against the United States. See 09-499 Pet. 9-10. But in the face of such unambiguous statutory language, petitioners' reliance on the doctrine of constitutional avoidance is altogether unavailing. The court of appeals acknowledged that constitutional avoidance must be considered in resolving statutory ambiguities, Pet. App. 8a, but it saw no ambiguity in the congressional command that "[n]o court of the United States shall have jurisdiction to entertain such claims." And as this Court has often held, where there is no ambiguity, there is no basis for an alternative construction for the purpose of avoiding an asserted constitutional claim. See, *e.g.*, *Department of HUD* v. *Rucker*, 535 U.S. 125, 134-135 (2002); *Miller* v. *French*,

530 U.S. 327, 341 (2000); see also *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009) (describing the canon of constitutional avoidance as "a tool for choosing between competing *plausible* interpretations of a statutory text") (emphasis added; citation omitted). Petitioners offer no plausible reading that would allow them to maintain their claims.

First, there is no merit to petitioners' contention (Pet. 19; 09-499 Pet. 11) that claims alleging that the United States is liable for a shortfall in compensation paid by the RMI's Claims Tribunal are not "based upon, aris[ing] out of, or * * * in any way related to" the nuclear testing program conducted in the Marshall Islands. By definition, any claim brought in the Claims Tribunal must meet that same definition, Section 177 Agreement Art. IV, § 1(a) (Pet. App. 271a), and petitioners indisputably sought compensation for the United States' use of Bikini and Enewetak Atolls during the nuclear testing program. Even if petitioners' only contention in this Court were that the United States had taken, without just compensation, the claims they pursued in the Claims Tribunal, that contention still would necessarily "relate[] to" the nuclear testing program. Indeed, petitioners themselves characterize their claim as seeking to recover a "shortfall" in compensation for their underlying claims arising from the nuclear testing program. 09-499 Pet. 8; see *id.* at 9-10.

Second, the Compact Act is not rendered ambiguous by the mere fact that it does not mention the Tucker Act, 28 U.S.C. 1491(a)(1). See 09-499 Pet. 12-14. The Section 177 Agreement does not need to specifically mention a suit against the United States in the Court of Federal Claims, because it specifies that "[*n*]*o court of the United States* shall have jurisdiction to entertain

such claims." Section 177 Agreement Art. XII (Pet. App. 278a) (emphasis added). Nothing in the cases petitioners cite requires a different rule: those cases dealt with general provisions imposing funding caps, limiting "review," and forfeiting "compensation," but *not* purporting to withdraw jurisdiction from any court, including Tucker Act jurisdiction. See *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 127-129 (1974); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Preseault* v. *ICC*, 494 U.S. 1, 12-13 (1990); *Glosemeyer* v. *Missouri-Kan.-Tex. R.R.*, 879 F.2d 316, 324-325 (8th Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Neely* v. *United States*, 546 F.2d 1059, 1064 (3d Cir. 1976). Here, by contrast, there is just such a withdrawal of jurisdiction; there is no need to specify that "[n]o court" includes the Court of Federal Claims. Cf., *e.g.*, *United States* v. *Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511, 1516, 1518 (2008) (explaining that "the language of the relevant statutes," which provides that '[*n*]*o suit* . . . shall be maintained in *any court* for the recovery of'" specified unlawful taxes unless certain procedures are followed, "emphatically covers" constitutional claims brought under the Tucker Act).[7]

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[7] *INS* v. *St. Cyr*, 533 U.S. 289 (2001), is of no help to petitioners here. In that case, this Court held that an immigration statute providing that "no court shall have jurisdiction to review" certain alien removal orders did not withdraw pre-existing habeas corpus jurisdiction in deportation cases. *Id.* at 311-312. The basis for the Court's holding, however, was evidence of "historically distinct meanings" given to judicial "review" and "habeas corpus" proceedings in the immigration context. *Ibid.* Here, by contrast, there is no such ambiguous term in the Section 177 Agreement's command that "[n]o court of the United States shall have jurisdiction to *entertain* such claims." Section 177 Agreement Art. XII (Pet. App. 278a) (emphasis added).

Nor could Article XII "co-exist[]" with the Tucker Act, 07-499 Pet. 12 (citation omitted), without losing all meaning. Article XII prescribes that "[n]o court of the United States shall have jurisdiction to entertain such claims"; petitioners urge that the Court of Federal Claims *should* have jurisdiction to entertain such claims. Those positions are irreconcilable. In *Monsanto*, for instance, the statute that allegedly ousted Tucker Act jurisdiction could readily be interpreted as an exhaustion provision rather than a bar, see 467 U.S. at 1018, and thus to coexist with Tucker Act jurisdiction. Here, by contrast, reading Article XII to impose only an exhaustion requirement would undo the finality of the "full and final settlement" ratified by Congress.

The implausibility of petitioners' reading is made all the clearer by the role of the RMI's Claims Tribunal under the Compact and the Section 177 Agreement. Congress did not create the Claims Tribunal or agree to pay its awards in full. To the contrary, the Claims Tribunal was created by act of the Nitijela—the legislative body of the RMI—"[i]n furtherance of the desire of the Government of the Marshall Islands to provide an additional long- term means for compensating claims resulting from the Nuclear Testing Program." Section 177 Agreement Art. IV (Pet. App. 270a-271a); see Pet. App. 52a. Claims Tribunal awards are to be paid by the RMI from a fund established from a portion of the $150 million settlement proceeds. Section 177 Agreement Art. II, § 6(c) (Pet. App. 267a). The United States does not participate in those proceedings, which are internal to the RMI; indeed, the tribunal has "no jurisdiction over the United States * * * with respect to claims of the Government, citizens or nationals of the Marshall Islands arising out of the Nuclear Testing Program."

*Id.* Art. IV, § 1(a) (Pet. App. 271a). The role of the Claims Tribunal is therefore akin to that of the Foreign Claims Settlement Commission in the United States, which considers claims of the United States citizens to facilitate the pro rata distribution of funds the United States might received in a lump-sum settlement with a foreign government. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 680-681 (1981). The RMI's Claims Tribunal therefore cannot plausibly be regarded as a forum for exhausting claims against the United States, as simply one step before a return to the Court of Federal Claims for a suit under the Tucker Act.

The Compact, the Compact Act, and the Section 177 Agreement cannot be read to give the tribunal the task of adjudicating monetary liability on the part of the United States. The United States "fulfill[ed] * * * its obligations under Section 177 of the Compact" by paying the $150 million settlement amount to the Marshall Islands. *Id.* Art. I, § 1 (Pet. App. 262a). Petitioners make no allegation that the United States failed to fund the Claims Tribunal as it agreed to do.

c. Of course, legislative history could not detract from the plain language of Article XII, but in any event petitioners are incorrect in their contention that "nothing in the legislative history of Section 177 evidences Congress's intent affirmatively to prevent a Tucker Act claim as a constitutional backstop to the Tribunal process." 09-499 Pet. 14. In approving the Compact Act in 1985, the House Committee on Foreign Affairs explained in relevant part:

> A number of lawsuits have been lodged against the United States Government by individuals from various islands in the Marshalls, seeking approximately $5 billion in damages stemming from our nu-

clear weapons testing program. With the exception of the Bikini rehabilitation lawsuit, none of these suits have been resolved yet.

> Section 177 of the compact provides for a *comprehensive settlement* of *all of these lawsuits* and *any future claims against the United States.* Under the terms of this provision, the United States Government will provide the Government of the Marshall Islands with a $150 million trust fund as just, adequate, and *full settlement of all claims against the United States* and its agents in regard to the Marshall Islands and its citizens resulting from the nuclear weapons testing program. The Government of the Marshall Islands will espouse and settle these claims *and foreclose all further adjudication of them in the courts of the United States.*

H.R. Rep. No. 188, 99th Cong., 1st Sess., Pt. 1, at 8 (1985) (emphasis added). Thus, Congress was well aware when it provided that "any such claims pending in the courts of the United States shall be dismissed," Section 177 Agreement Art. XII (Pet. App. 278a), that it was directing the dismissal of claims under the Tucker Act. See p. 5, *supra.*

2. Petitioners are likewise incorrect in their contention that the court of appeals erroneously rejected their constitutional arguments. Indeed, the court of appeals did not need to discuss those constitutional arguments at any length at all, because of the unique fact that separates this case from all of those petitioners cite: petitioners' claims were settled. Indeed, the jurisdictional provision that controls this case was a part of the settlement agreement. By contrast, every case petitioners cite involved *live* takings claims.

Thus, before this Court could even reach the constitutional claims petitioners press here, it would have to agree with petitioners on the threshold argument that the RMI did not validly espouse and settle its citizens' claims. See Pet. 22-24; 09-499 Pet. 19. Even if this Court's precedents permitted judicial review of that question (which they do not, as the court of appeals correctly recognized), petitioners' arguments about the RMI's capacity to carry out its commitment in the Compact and the Section 177 Agreement are not well taken. No further review of those issues is warranted.

a. The Compact recognizes the self-determination of the Marshallese people. See Compact preamble, 99 Stat. 1800 (Pet. App. 181a). Indeed, before the Compact was ever presented to Congress, the Marshallese people had considered it and approved it by plebiscite. At the time Congress acted, therefore, the people of the Marshall Islands had formed a body politic that was capable of treating with the United States. The Compact is phrased in just such terms. *Ibid.*[8] Moreover, the Compact's Section 177 Agreement, which effected the espousal, was negotiated and executed by Marshall Islands representatives on behalf of their government, and countersigned by a United States Ambassador appointed by President Reagan. See Section 177 Agreement, Hein's No. KAV 4575, at xviii; see also Pet. App.

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[8] It has long been recognized that Trust Territory inhabitants were not United States citizens, and that the Trust Territory was not part of the sovereign territory of the United States. See *Porter* v. *United States*, 496 F.2d 583, 587-590 & n.4 (Ct. Cl. 1974), cert. denied, 420 U.S. 1004 (1975); see also Trusteeship Agreement Art. 11(1), 61 Stat. 3304, 8 U.N.T.S. 196 (Pet. App. 287a) (the United States "shall take the necessary steps to provide the status of citizenship *of the trust territory* for the inhabitants of the trust territory") (emphasis added).

248a; Arthur J. Armstrong & Howard L. Hills, *The Negotiations for the Future Political Status of Micronesia (1980-1984)*, 78 Am. J. Int'l L. 484 (1984). And the principle that one sovereign may espouse and settle claims by its nationals against another sovereign is well established, as petitioners acknowledge. Pet. 24 n.8; *Dames & Moore*, 453 U.S. at 679 (agreements between nations "settling the claims of their respective nationals" are "'established international practice'") (quoting Louis Henkin, *Foreign Affairs and the Constitution* 262 (1972)).

In entering into the Compact and the Section 177 Agreement, the political Branches necessarily agreed that the Government of the Marshall Islands possessed the authority to espouse and settle the claims of its nationals. See Compact § 471(a), 99 Stat. 1834 (Pet. App. 246a) ("The Government of the United States and the Government[] of the Marshall Islands * * * agree that they have full authority under their respective Constitutions to enter into this Compact and its related agreements and to fulfill all of their respective responsibilities in accordance with the terms of this Compact and its related agreements."). That determination is not subject to the sort of judicial second-guessing that petitioners invite.[9]

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[9] The Bikini petitioners contend, for instance, that the Government of the Marshall Islands lacked capacity to espouse and settle their claims without *their* express participation. 09-499 Pet. 19. The legal basis for that assertion is unclear, and indeed, the Bikini petitioners disavowed any such argument in the court of appeals. See 2007-5175 Pet. C.A. Reply Br. 19 ("[T]he government * * * insist[s] that the Bikinians' claim is a challenge to the United States' recognition of the Marshall Islands government and the purported espousal of the Bikinians' claim. *But the Bikinians are making no such argument.*") (emphasis added; citation omitted). In any event, the people of the

Because petitioners challenge the very capacity of the United States' compacting partner to carry out the Compact, their challenge is not justiciable. Such a challenge goes far beyond the traditional judicial function of *interpreting* a treaty, as in the cases petitioners cite (Pet. 29). Rather, petitioners' argument amounts to a "disapproval or non-recognition" of not only the espousal, but also the United States' agreement to recognize the Government of the Marshall Islands as having the capacity to espouse and settle claims of its citizens. *United States* v. *Pink*, 315 U.S. 203, 232 (1942). As the court of appeals observed, these types of recognition, political, and policy questions are excluded from judicial review. See *id.* at 229-232 ("Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts.") (citing *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937)).[10]

Similarly, in *Doe* v. *Braden*, 57 U.S. (16 How.) 635 (1854), this Court upheld and applied a provision of the 1819 treaty of cession (and an attached declaration) expressly invalidating several grants that the King of Spain had made, while the treaty negotiations were underway, of lands later ceded by the treaty. Although the

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Marshall Islands themselves approved by plebiscite the Compact provision authorizing the settlement of "all such claims."

[10] In *Pink*, this Court held the political question doctrine barred judicial review of the claims of foreign creditors who challenged the Soviet Government's nationalization of Russian property, an act that "the United States by its policy of recognition agreed no longer to question." 315 U.S. at 231. So too here: petitioners challenge the Government of the Marshall Islands' espousal, reflected in the Compact and the Section 177 Agreement, an act that the United States, under its policy of recognition, likewise acknowledged and accepted.

Spanish grantees' successors contended that the King lacked power to agree to extinguish their rights in that manner, this Court explained that it would not second-guess the political Branches' exercise of the powers to recognize nations and make treaties, and thus would not examine the competence of the United States' treaty partner to make the agreement. *Id.* at 657-658.

b. Petitioners assert that a different rule should apply here, on the theory that before it entered into the Compact, the Marshall Islands lacked the capacity to espouse their claims because it was not a sovereign government but, rather, was under the United States' authority and control. Pet. 23-27; 09-499 Pet. 19.[11] That contention is at odds with the Compact itself, which explains that the Marshall Islands negotiated and entered into the Compact to establish a "government-to-government relationship[]" with the United States. Compact preamble, 99 Stat. 1800 (Pet. App. 181a).

The Marshall Islands had adopted a constitution and negotiated a compact of free association, and the United Nations Trusteeship Council had approved the termination of its trusteeship status. Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986); T.C. Res. 2183, U.N. Doc. T/RES/2183 (May 28, 1986).[12] Thus, petitioners would have to establish that a trust territory in that position may not, in negotiating the compact by which it leaves trust-territory status, espouse the claims of its citizens as any other sovereign can, even though the espousal

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[11] Indeed, the Enewetak petitioners concede that if the Government of the Marshall Islands was a sovereign government for these purposes, it could espouse and settle its citizens' claims against another sovereign. Pet. 24 n.8.

[12] The Security Council later ratified the Trusteeship Council's recommendation. S.C. Res. 683, U.N. Doc. S/RES/683 (Dec. 22, 1990).

takes effect only once the compact itself becomes effective, the former territory is confirmed as "self-governing" with "the capacity to conduct foreign affairs," Compact §§ 111, 121(a), 99 Stat. 1801, and the United States formally recognizes the nation's new status, see Proclamation No. 5564, 51 Fed. Reg. at 40,400. Petitioners cite nothing to support their contention that the Constitution prohibits the political Branches from recognizing an espousal and settlement of claims in those circumstances—and accepting that contention would greatly undermine the ability of the United States to provide for the full independence of a trust territory through a process of negotiation with the representatives of the duly constituted government of that territory.

In any event, petitioners offer no reason why this Court's review would be warranted to consider the status of the Marshall Islands before the 1986 Compact. That question lacks recurring significance. Indeed, there are no more United States trusteeships; the last remaining United States trust territory, Palau, became independent in 1994. Proclamation No. 6726, 59 Fed. Reg. 49,777 (1994).

c. Finally, contrary to petitioners' assertion, the Federal Circuit's decision does not conflict with this Court's decision in *Dames & Moore*. Petitioners seize upon the Court's statement that, "to the extent [Dames & Moore] believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act." *Dames & Moore*, 453 U.S. at 689-690; see Pet. 28. The Court made that statement, however, in reference to the so-called "treaty exception" to the jurisdiction of the Court of Claims, 28 U.S.C. 1502, not to the political question

doctrine. See *Dames & Moore*, 453 U.S. at 689. Moreover, *Dames & Moore* did not present, as here, an issue respecting a foreign government's capacity to espouse claims, or the United States' recognition of that authority.

3. Petitioners argue that the Federal Circuit's decision conflicts with decisions of this Court and other circuits holding that the Just Compensation Clause is "self-executing." In this regard, petitioners maintain that claims for just compensation are self-executing, that they are vested within the jurisdiction of the federal courts by the force of the Just Compensation Clause, and that such jurisdiction is not dependent upon, and cannot be foreclosed by, any congressional enactment. According to petitioners, the Federal Circuit's decision permits Congress to evade its constitutional duty to pay just compensation by holding that Congress may create an exclusive, alternate tribunal to decide just compensation claims, but refuse to pay fully the awards of the alternate forum. Pet. 13-16, 09-499 Pet. 16-21. Petitioners' contention lacks merit and does not warrant further review.

a. The Federal Circuit did not address the scenario petitioners spin out. Rather, the court held that, as part of its ratification of the Compact and settlement of all claims, Congress unambiguously withdrew jurisdiction pursuant to the claims settlement. Pet. App. 6a-8a. Petitioners offer no reason why Congress cannot, within the bounds of the Just Compensation Clause, withdraw Tucker Act jurisdiction over a class of claims that have been fully and finally settled. To the contrary, petitioners acknowledged in the proceedings below that "[w]ithdrawing jurisdiction over claims that have been validly settled and released is perfectly constitutional." 2007-

5175 C.A. App. A1000-A1002; accord 2007-5176 C.A. App. A428. That concession alone warrants denial of the petitions.

At bottom, the Federal Circuit correctly recognized that this case involves a foreign country that has espoused and settled its nationals' claims in the context of an international compact. The Compact withdraws federal jurisdiction in clear terms and, instead, authorizes the independent government of the RMI to petition Congress for additional relief on behalf of its citizens. The RMI has done so, and its request is pending before Congress, the appropriate interlocutor. See note 6, *supra*.

For those reasons, even if the statutes here were ambiguous, there simply is no substantial constitutional question that would justify imposing a saving construction. Whether or not the Government of the Marshall Islands lacked the capacity to espouse claims, the fact remains that Congress has withdrawn federal jurisdiction based upon its determination that the Compact effected a "full and final settlement." And that settlement involved the provision of a substantial sum of money for a number of purposes, including compensation of those with outstanding claims. This case therefore does not present a situation like that in the *Regional Rail Reorganization Act Cases*, in which the only compensation offered under the challenged statute—*i.e.*, common stock in an "unproved entity" of highly questionable value, perhaps zero (419 U.S. at 137 & n.21)—was coupled with Congress's apparent determination that it would not appropriate any funds "beyond those expressly committed by the Act." *Id.* at 127.

b. Although the question is not presented here, there is no merit to petitioners' assertion that Congress is powerless to withdraw Federal court jurisdiction with

respect to suits for just compensation. Petitioners correctly note that the Just Compensation Clause's "self-executing" character means that the clause itself provides a substantive right to compensation where the government has taken property. The existence of that substantive right, however, does not prevent Congress from withdrawing its consent to suit in the Tucker Act. Congress may decline to waive the sovereign immunity of the United States, or may withdraw consent to suit that was previously given, even if the underlying claim may be one of constitutional dimension. See *Lynch* v. *United States*, 292 U.S. 571, 581 (1934); *Antolok*, 873 F.2d at 373-375.[13]

Had Congress chosen to do so, it could constitutionally have enacted only the withdrawal of consent for petitioners to sue the United States, while otherwise leaving their underlying claims unaffected and making no *advance* legislative provision for their ultimate resolution. It follows that Congress' action here is not rendered unconstitutional by virtue of the facts that the same Act of Congress that withdrew Tucker Act jurisdiction also approved a settlement of the claims and provided for a lump-sum payment of $150 million for those and other purposes, and that, in the Section 177 Agreement, the Government of the Marshall Islands also un-

[13] Prior to the enactment of the Tucker Act in 1887, Congress had not waived the sovereign immunity of the United States with respect to suits for just compensation. See *Langford* v. *United States*, 101 U.S. 341, 343 (1880). Consequently, plaintiffs whose property had allegedly been taken by the Government for public use were constrained to pursue relief directly from Congress or in the courts under alternate legal theories—for example, by seeking possession of the property through a suit for ejectment against a Government official, rather than bringing a suit against the United States itself. *E.g.*, *United States* v. *Lee*, 106 U.S. 196, 218-223 (1882).

dertook to establish its own claims tribunal mechanism to decide the amount of compensation that, in its assessment, should be paid for injuries resulting from the nuclear testing program.

c. There is likewise no merit to the Bikini petitioners' contention (09-499 Pet. 14-21) that the Federal Circuit's decision conflicts with prior decisions holding that a Tucker Act remedy "cannot be defeated by congressional design." In *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948), the Second Circuit did not address a withdrawal by Congress of the consent to sue the United States; rather, the case involved a dispute between private parties to recover overtime pay in accordance with the provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* In *Wisconsin Central Ltd.* v. *Public Service Comm'n*, 95 F.3d 1359 (7th Cir. 1996), a suit seeking declaratory and injunctive relief against rules regarding conditions required for utilities to place transmission facilities across railroad rights-of-way, the Seventh Circuit generally observed that "[t]he just compensation requirement of the Takings Clause places takings in a class by themselves because, unlike other constitutional deprivations, the Takings Clause provides both the cause of action and the remedy." *Id.* at 1368. As in *Battaglia*, the court did not address a withdrawal by Congress of its consent to sue the United States under the Tucker Act. Accordingly, there is no conflict between those decisions and this one.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2010

Supreme Court, U.S.
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No. 09-499

IN THE

# Supreme Court of the United States

PEOPLE OF BIKINI, BY AND THROUGH THE KILI/BIKINI/EJIT LOCAL AND GOVERNMENT COUNCIL,
*Petitioners*,

v.

UNITED STATES OF AMERICA.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit*

## REPLY BRIEF FOR THE PETITIONERS

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March 16, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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## REPLY BRIEF FOR THE PETITIONERS

According to the government's opposition and the Federal Circuit's decision, the Bill of Rights' command – "nor shall private property be taken for public use without just compensation," U.S. Const. Amend. V – is just a suggestion. It takes nothing more than a wave of the legislative wand for Congress to erase that individual right *and* to push this Court and the rest of the judiciary aside, absolutely debarring any court, state or federal, from providing any judicial review of that constitutional expunction. Given the Federal Circuit's broad purview over Fifth Amendment Takings Clause claims, adoption of that extraordinary proposition as the constitutional law of the land would merit this Court's review in its own right. *See Bartlett v. Bowen*, 816 F.2d 695, 704 (D.C. Cir. 1987) ("[I]n the entire history of the United States, the Supreme Court has never once held that Congress may foreclose all judicial review of the constitutionality of a congressional enactment."). But the fact that the Federal Circuit predicated its ruling on statutory text that lacks the clarity this Court's and other circuits' precedents demand requires this Court's review to restore uniformity in Fifth Amendment law and to ensure that courts do not, as a matter of statutory construction, instigate erosions of constitutional rights that Congress never intended.

1. Neither the Federal Circuit nor the government has suggested that the less than one-half of one percent of compensation that was provided here before the Nuclear Claims Tribunal process collapsed satisfies the Fifth Amendment's demand of "just compensation." Nor does the

government deny the profound constitutional implications of the court of appeals' holding that Congress can foreclose any and all judicial review of the petitioners' constitutional claim for just compensation. But neither the Federal Circuit nor the government ever comes to grips with the fact that nothing in the Compact Act compels that constitutionally troubling result, or that reading the text as doing so squarely conflicts with this Court's precedent.

Like the court of appeals, the government's argument (Opp. 9-10) stresses the language that withdrew jurisdiction in the first instance and channeled claims into the Tribunal. But this Court could not have been clearer in the *Regional Rail Reorganization Act Cases* (*Blanchette v. Connecticut Gen. Ins. Corp.*), 419 U.S. 102 (1974), that language that is sufficient to withdraw a Tucker Act remedy in the first instance is *not* sufficient to foreclose a Tucker Act remedy for any "constitutional shortfall" in that alternative remedial process, *id.* at 136, 148. And the language that Congress used here is not materially different from statutory language that this Court and other courts of appeals have held is not sufficient to completely foreclose all judicial review of a Takings Clause claim. *See* Pet. 10, 13 (citing cases); *Glosemeyer v. Missouri-Kansas-Texas R.R.*, 879 F.2d 316, 325 (8th Cir. 1989) ("legislative silence" on interaction between statute and Tucker Act preserved Tucker Act jurisdiction); *Feinberg v. FDIC*, 522 F.2d 1335, 1341-1342 (D.C. Cir. 1975) (jurisdiction remains even though statute says that "[n]o court shall have jurisdiction to * * * review, modify, suspend, terminate, or set aside" orders under the statute); *Neely v. United States*, 546 F.2d

1059, 1064 (3d Cir. 1976) (Tucker Act jurisdiction preserved where "there is no evidence of legislative concern on the matter one way or the other").

The government's effort to distinguish *INS v. St. Cyr*, 533 U.S. 289 (2001), actually proves petitioners' point. The government argues (Opp. 12 n.7) that the immigration law at issue in *St. Cyr* only precluded Administrative Procedure Act review, and not habeas corpus review. True – but that is only because this Court applied the very rule of statutory construction that the Federal Circuit cast aside here (Pet. App. 8a) and rejected the argument advanced by the government in *St. Cyr* that the sweeping language of the immigration law's bar on judicial review was sufficient to foreclose review of even constitutionally protected habeas corpus claims. *Compare St. Cyr*, 533 U.S. at 313 (provision does not "speak[] with sufficient clarity to bar jurisdiction"), *with* U.S. Pet. Reply Br., *St. Cyr, supra*, at 2 n.1 ("Because Section 1252(a)(2)(C) says that 'no court' shall have jurisdiction, that Section independently bars district court review in this case * * * '[n]otwithstanding' * * * 28 U.S.C. § 2241's provision for habeas corpus review."); *and* U.S. Pet. Br., *St. Cyr, supra*, at 25 ("The sharp line the court of appeals perceived between 'judicial review' and 'habeas corpus' in the immigration context simply does not exist.").

The government thus simply repeats here the same statutory approach rejected by this Court in *St. Cyr*. The only difference is that it worked this time. But that is because of the Federal Circuit's erroneous determination that completely foreclosing review of constitutional claims does not occasion any need for "caution" or "follow[ing] the careful course of the

*Blanchette* case." Pet. App. 8a. Given the Federal Circuit's jurisdictional dominance over federal Takings Clause claims, that direct conflict with this Court's precedent and the approaches of other circuits is precisely what warrants further review.

2. The government's insistence that these claims were disposed of by a "settlement" begs both questions presented. First, the argument simply assumes away the first question presented about what, in adopting the Compact Act and Section 177 Agreement, Congress intended would happen to constitutional claims if the Tribunal process collapsed before just compensation was paid.

Second, there is no dispute that the individual U.S. citizens and dependents whose constitutional claims are at stake never individually settled or waived their constitutional claims. The government's entire argument thus directly raises, rather than avoids, the second question presented: whether the federal government can, by legislation or agreements with third parties, completely extinguish individual constitutional claims against itself. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986) ("[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party.").

That is not, as the government mistakenly argues (Opp. 16), a question of espousal. Espousal is a question of the Marshall Islands' power and authority. But this dispute is all about the United States' power – or not – to extricate itself unilaterally from the Fifth Amendment's command of just compensation and the claims of its own citizens and dependents against itself. The question,

in other words, is whether the United States government has the power in the first instance to legislatively contract itself out of the Takings Clause. Since there was no settlement or contract with the individual persons whom the Fifth Amendment protects, which governmental entity the United States contracted with is beside the point.

Indeed, this Court recognized in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), that, when the federal government uses the private property rights of individual citizens to effectuate governmental policy, the fact that the United States struck a deal with another government is "no jurisdictional obstacle" to a Fifth Amendment takings claim pursued under the Tucker Act, *id.* at 689-690. As Justice Powell explained, "[t]he Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts." *Id.* at 691 (Powell, J., concurring & dissenting in part).[1]

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[1] The contrast between this case and the Iran Claims Tribunal underscores the profound constitutional deficiencies in the United States and Federal Circuit's positions. In *Dames & Moore*, the United States required the government of Iran to maintain a balance of $500 million in the Tribunal's account until all awards were paid. U.S. Br., *Dames & Moore*, at 7 (No. 80-2078). Here, by contrast, the United States insists that forcing the petitioners to divert their claims to a "manifestly inadequate" Tribunal that has virtually gone out of business without paying anything remotely approaching just compensation is perfectly acceptable to the Fifth Amendment, and there is absolutely nothing the federal judiciary can do about it. Former Attorney General Dick Thornburgh, *et al.*, *The Nuclear Claims Tribunal of the Republic of the Marshall Islands* 3 (Jan. 2003).

Nor is *United States v. Pink*, 315 U.S. 203 (1942), of any help to the government. *Pink* involved the President's resolution of *non-constitutional* claims against a foreign government. It says nothing about Congress's ability to legislate or contract the *United States government* out of *constitutional* claims by *United States citizens and dependents* against the *United States government*. *See Medellin v. Texas*, 552 U.S. 491, 495 (2008) (*Pink* "involve[d] a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals.").[2]

The government's invocation of *Lynch v. United States*, 292 U.S. 571 (1934), fares no better. That case did not hold that Congress can strip all federal courts of jurisdiction over Takings Clause claims and thereby arrogate to itself the unreviewable authority to conclusively determine just compensation. Quite the opposite, in *Lynch*, this Court held that a statute that canceled insurance contracts did not limit Tucker Act jurisdiction. *Id.* at 583 ("Congress did not aim at the remedy."). To the extent the decision broadly implied that Congress could withdraw

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[2] Analogizing the Tribunal to the Foreign Claims Settlement Commission, Opp. at 14, is off base. That Commission is a federal agency that considers claims by U.S. citizens against foreign governments and allocates funds obtained in settlements between the United States and foreign governments. *Dames & Moore*, 453 U.S. at 680. Those are not constitutional claims against the United States, and there is no reason to think that those citizens would ever have had any opportunity to seek recovery from the foreign governments directly. Hence, any limitation on the funds available from the Foreign Claims Commission does not effect a deprivation of a preexisting property interest.

jurisdiction over constitutional claims, *id.* at 581-582, that language was dicta because *Lynch* involved contract, not constitutional Takings Clause claims. *Id.* at 582. And even that dicta has long since been repudiated. "The just compensation clause may not be evaded or impaired by any form of legislation." *Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 368 (1936). *See First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 304, 315 (1987) (Just Compensation Clause is "self-executing"); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696 (1949) (recognizing the "constitutional exception to the doctrine of sovereign immunity"); *Regional Railroad Reorganization Act Cases*, 419 U.S. at 135, 151 n.39.[3]

In any event, while the United States no doubt agrees with the Federal Circuit's decision on the merits, the issue at this stage is whether that court's

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[3] Contrary to the government's argument (Opp. 23), this Court long recognized, even prior to enactment of the Tucker Act, that there must be some judicial remedy when private property is taken for public use and just compensation is not paid. *See United States v. Great Falls Manufacturing Company*, 112 U.S. 645, 656 (1884) (When the United States has "taken the property of the claimant for public use," it is "under an obligation, imposed by the Constitution, to make compensation," and "[t]he law will imply a promise to make the required compensation" when such a taking occurs."); *United States v. Lee*, 106 U.S. 196, 220 (1882) (sovereign immunity defense unavailing because "it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation"); see also Pet. 18-19. *Langford v. United States*, 101 U.S. 341 (1880), is inapt because it involved the government's use of property under a claim of title and thus involved a tort or quiet title claim, not a taking, *id.* at 344.

expansion of *Pink* and *Lynch* to empower the Executive Branch to cut off both constitutional claims against itself, and the judiciary's ability to review that action, are sufficiently important questions to merit this Court's review. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893) ("It does not rest with [Congress] to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."). Given the impact of that ruling on the law of the preeminent circuit for Takings Clause claims and the sheer size and number of constitutional claims at issue in this case, the questions presented are of vital importance to the law and have the type of broad impact on numerous individuals that warrant this Court's review. *Cf. United States v. Winstar Corp.*, 518 U.S. 839 (1996).

3. Finally, this case is solely about jurisdiction over the constitutional claims of individuals, not the merits of the government's vision of the deal it struck with the Marshall Islands. The issue thus is not whether the Court should "undo" an alleged settlement (Opp. 13), but the much more foundational question of whether this Court and the lower federal courts have any authority to stand, as they always have, as the ultimate backstop for the enforcement of constitutional rights that the government has attempted to escape.

In that regard, it is important to note that the Solicitor General's express position today is that Congress paid not the individuals whose land was taken, but the Marshall Islands – a territorial government under its dominion and control – less

than $46 million to dispose of "$5 *billion* in damages" sought by all affected Marshall Islanders, not just petitioners. Opp. 14 (emphasis added; quoting H.R. Rep. No. 99-188, pt. 1, at 8 (1985)).[4] That is what the United States insists it has the unchecked and unreviewable power to do, thereby reducing petitioners' individual Fifth Amendment rights to nothing more than domestic policy bargaining chips in the government's dealings with a federal territory.

Furthermore, it confesses much about the legal fragility of the United States' position that it portrayed the Section 177 Agreement quite differently to this Court and to the Federal Circuit in the wake of its adoption, persuading the Federal Circuit that the law was meant to provide "in perpetuity, a means to address past, present and future consequences" of the government's nuclear testing program, *People of Enewetak v. United States*, 864 F.2d 134, 136 (Fed. Cir. 1988). *See also* U.S. Br. in Opp. to Pet. for Cert., *People of Enewetak v. United States* (88-1466), at 11 ("[T]he Fund will operate in perpetuity to compensate any claims that have arisen or may arise from the testing program.").[5] The government likewise told this

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[4] To be sure, the government cites the $150 million payment (*ibid.*), but forgets to explain that only $45.75 million of that was set aside to fund the Tribunal's awards. The remainder was provided for other purposes, such as funding the Tribunal's operations. Pet. App. 123a-124a.

[5] *See also* U.S. C.A. Br., *People of Enewetak v. United States* (No. 88-1206 *et al.*) at 34, 38, 45 (advising Court of Appeals in 1988 that the $45.75 million payment was "cornerstone funding," and a "base investment" for a compensation scheme designed to provide "continuous funding" and a "comprehensive, long-term compensation plan" that was "structured to operate permanently").

Court in 1988 that it could provide just compensation either "through a judicial Tucker Act remedy * * * [or] some other equivalent remedy," *id.* at 12. It notably did not ague that it was free to provide *neither* and simply walk away from the Fifth Amendment because it had legislated itself right out of the Constitution's limits on governmental power.[6]

The central problem with all of the government's arguments is that nowhere in its brief in opposition or in any other brief filed in this case has it explained how, if the Fifth Amendment reserves rights in individuals and thereby withholds that very power from the federal government, the federal government has the power to legislate or contract those rights away without those individuals' consent. Contrary to the government's central supposition, whom it contracts with – whether the Marshall Islands, other federal territories like the District of Columbia or Guam, States, or even foreign nations – does not change the Constitution's answer. The Fifth Amendment withholds that power. If the Nation's foreign or domestic political ends are served

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[6] The government's effort to portray petitioners as citizens of a foreign government challenging a foreign policy decision is both misguided and disappointing. The Compact requires the Marshall Islands to "consult" with the United States in conducting its foreign affairs, empowers the United States to act on the Marshall Islands' behalf in foreign relations, and vests the United States with supervisory control and veto power over defense and security matters. Pub. L. No. 108-188, pt. 3, §§ 123,, 311, 313, 315 117 Stat. 2797, 2820-2822 (2004). No fewer than 27 times, the U.S. Code expressly defines the Marshall Islands as a "State." Petitioners include United States citizens and individuals who have served or are serving as members of the United States Armed Forces, including in Iraq. *See* 10 U.S.C. § 503.

by taking individual property, the Constitution says the price for that public use is just compensation. If Congress can escape that command simply by passing a law or contracting with another governmental entity, as the Federal Circuit held, then the Fifth Amendment has become an empty promise not just for petitioners, but for any and all private property owners.

## CONCLUSION

For the foregoing reasons and for those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 16, 2010